

No. 11727

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Appellant,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Southern Division

FILED

NOV 12 1947

PAUL P. O'BRIEN,

CLERK



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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is **printed and cancelled** herein accordingly. When possible, an omission from the text is indicated by *printing in italic* the two words between which the omission seems to occur.]

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## ATTORNEYS OF RECORD

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Attorney for Appellee.

In the District Court of the United States, Western  
District of Washington, Southern Division

Civil Cause No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendant.

### COMPLAINT

Plaintiff, for its cause of action against the defendant, shows and alleges as follows:

#### I.

That plaintiff, The Ohio Ferro-Alloys Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Canton, in said State; that the defendant, City of Tacoma, is a municipal corporation of the State of Washington, situate in Pierce County in said State and within the Southern Division of the Western District of Washington. That the matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of \$3,000.00, and the above entitled Court has jurisdiction thereof under and

by virtue of Section 24 of the Judicial Code of the United States, as amended, Title 28 U.S.C.A., Section 41, and Section 274d of said Judicial Code, Title 28, U.S.C.A., Section 400.

## II.

That pursuant to Ordinance No. 11956 of said City of Tacoma, passed March 10, 1941, and entitled:

“An Ordinance authorizing the execution and delivery of a contract between the City of Tacoma, for and on behalf of its Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation, an Ohio corporation, for the sale of electric energy by the City to said corporation and fixing the terms and conditions of such contract,”

the parties hereto, under date of March 21, 1941, entered into a contract in writing, whereby the defendant City agreed to furnish and sell to plaintiff corporation, and plaintiff corporation agreed to purchase from defendant City, the electric power, exclusive of by-product power, required for the operation of a plant for the manufacture of electro-metallurgical products to be constructed, operated and maintained by plaintiff corporation in the City of Tacoma; that said contract is in full force and effect and by its terms will continue in effect until March 21, 1951; that a true copy thereof is hereto attached, marked Exhibit “A” and made a part hereof by this reference.

## III.

That in accordance with said contract, plaintiff completed construction of its plant in the City of Tacoma, and on or about July 7, 1941, commenced taking and has continuously since taken from the City of Tacoma the initial block of 6500 kilowatts of power known and designated as the "Contract demand." That as contemplated in the contract, plaintiff installed at its said plant a second electric furnace, and on or about November 3, 1941, and in accordance with the terms of said contract, commenced the taking of an additional block of 6000 kilowatts of electric power for the operation of said second furnace and continued to take such additional block of power without interruption until April 26, 1944.

## IV.

That on or about March 21, 1944, plaintiff having found that its operations would be interrupted and interfered with by orders of the War Production Board, an agency of the United States Government, removing ferro-chrome from its system of allocations and prohibiting the use of ferro-chrome in the manufacture of alloy steel, and having determined that because of said orders the operation of the second furnace would necessarily be temporarily suspended, notified the defendant City, under and pursuant to Article 19 of the contract, that for causes beyond plaintiff's control, to-wit, the orders of the War Production Board above referred to, the operation of the second furnace would be



temporarily suspended, but in such notification expressly denied that it was invoking its right under Article 10 of the contract temporarily to suspend the taking of said additional block (6000 kilowatts) of power. The defendant City, in response to such notice, denied that the proposed suspension was within the terms or governed by Article 19 of the contract but agreed that it was not under any other provisions of said contract, and offered that, without prejudice to plaintiff's claim that such suspension was one within and governed by Article 19, plaintiff might, independently and irrespective of the terms of the contract, suspend operation of the second furnace and the taking of the additional block of power on fifteen days' notice and that such suspension should continue subject to the delivery and taking of said additional block of power being resumed upon fifteen days' written notice given by either party to the other. Plaintiff accepted said offer, and in reliance thereon, on April 11, 1944, gave written notice that the operation of the second furnace would be temporarily suspended at midnight on April 26, 1944, at which time the furnishing and taking of the additional block of 6000 kilowatts of electric energy was discontinued.

#### V.

Thereafter and on February 26, 1945, plaintiff again placed its second furnace in operation and resumed the taking of the additional block of power, pursuant to and in reliance upon the City's offer and agreement pursuant to which the taking of said

additional block of power had been temporarily suspended on April 26, 1944, as hereinbefore alleged. Plaintiff continued the taking of said additional block of power until midnight of September 22, 1945, when, after due notice, it temporarily dropped said additional 6000 kilowatts of power pursuant to the right reserved to it in subdivision (a) of Article 10 of the contract.

## VI.

That subsequent to the dropping on September 22, 1945, of the additional block of power and up to and including the bill rendered for the month of February, 1946, the defendant City has billed plaintiff for electric energy furnished on the basis that the "contract demand" and the "billing demand" under the contract were 12,500 kilowatts. Plaintiff is advised and believes and therefore alleges the fact to be that upon the proper interpretation of the contract, in the light of the events which had happened, the correct contract and billing demand at all times subsequent to September 22, 1945, was 6500 kilowatts, and that accordingly the defendant City has billed plaintiff for \$44,013.69 in excess of the amount to which it is justly entitled for or on account of the electric energy used by the plaintiff from September 1, 1945, to February 28, 1946.

## VII.

That plaintiff, notwithstanding it believed and believes the bills rendered by the defendant City for the electric energy used by the plaintiff during the

six months September, 1945, to February, 1946, inclusive, were incorrect and largely in excess of the amounts rightfully due and owing from the plaintiff, has paid all of said bills under written protest and under business compulsion in order to avoid a termination of the contract and consequent forfeiture and delivery to the defendant City for the escrow fund established under and pursuant to Article 11 of the contract.

### VIII.

That in the future operation of its plant in the City of Tacoma during the unexpired term of the contract, plaintiff expects to be able and to desire to resume the operation of its second furnace, and for that purpose to request the defendant City to again supply the additional power required for the operation of that furnace, but that the length of time that the second furnace will remain in operation following such resumption will or may be uncertain, and the parties are now in dispute as to the period of time during which plaintiff will be required under the terms of Article 10 of the contract to pay for the energy used during or following any such resumption of taking of the additional block of power. The plaintiff asserts that the proper interpretation of all terms of the contract, including those contained in Article 10 thereof, is that after there was an initial user of the additional block of power for one year or more the plaintiff may discontinue the use of such additional block of power on appropriate notice to the

City of Tacoma without incurring any obligation to pay for<sup>4</sup> such additional block of power for any period of time beyond that covered by the actual user of such additional block of power. The City of Tacoma asserts that, in its interpretation of the contract, once the plaintiff has resumed the use of such additional block of power that it must continue to pay therefor for a minimum period of one year.

Wherefore, Plaintiff prays:

(1) That the Court declare the rights, obligations and other legal relations of the parties hereto in respect of the contract between them of March 21, 1941, and in so doing adjudge:

(a) That the suspension of the taking of the additional block of power which commenced in April, 1944, and continued until February, 1945, was under a special agreement between the parties hereto, and entirely outside the contract provisions, the validity of which the city is estopped to deny so that the period thereof is to be entirely disregarded in determining the applicable rates and the plaintiff's liability to the City for energy used after the termination of such suspension; or as a first alternative,

(b) That such suspension of the taking of the additional block of power commencing in April, 1944, and continuing until February, 1945, was for a cause beyond the control of the plaintiff within and under the terms and provisions of Article 19 of said contract; or as a second alternative,

(c) That such suspension was a temporary dropping of said additional block pursuant to the first paragraph of Article 10(a) of said contract, that the resumption of the taking of said additional block in February, 1945, was a second taking of said additional block pursuant to the second paragraph of Article 10(a) thereof, and that in determining the payment to be made therefor the contract demand was to be altered upward only during the continuance of said second taking.

(d) That under the terms and provisions of said contract and in the events which have happened, the correct billing demand for the energy furnished by the City of Tacoma and used by the plaintiff during the period from September 22, 1945, to February 26, 1946, was 6500 kilowatts.

(e) That by reason of the plaintiff's payment of the bills as rendered by the City for electric energy for the period commencing September 22, 1945, to and including February 26, 1946, the City has been unjustly enriched in the sum of \$44,013.69.

(f) That Article 10 of the contract taken together with all other terms thereof means that if the City, after appropriate notice and demand from the plaintiff, resumes delivery of the second or additional block of power the plaintiff may again and at any time after at least one month's notice suspend the taking thereof and shall be obligated to pay for the increase billing demand only during the time that such additional block of power continues to be delivered irrespective of the duration had of such resumed delivery.

(g) That in the event the Plaintiff again places its second furnace in operation and the City resumes the furnishing of the additional 6000 kilowatts in electric power required for the operation of said furnace, the billing demand shall be increased or altered upward only for the period during which such additional block of power is taken, irrespective of the length of that period.

(2) That the plaintiff have judgment against the City of Tacoma for the sum of \$44,013.69, together with interest at six per cent per annum upon the amounts and from the dates of the receipt by the City of the several amounts or payments making said \$44,013.69 and for its costs and disbursements to be taxed herein according to law.

F. D. METZGER.

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Plaintiff.

[Endorsed]: Filed July 16, 1946.

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[Title of District Court and Cause.]

## ANSWER AND COUNTER-CLAIM

The defendant, answering the complaint of the plaintiff, shows and alleges as follows:

### I.

#### First Defense

The complaint fails to state a claim against defendant on which relief can be granted.



## Second Defense

## I.

Defendant admits the execution of the contract referred to in paragraph II of plaintiff's complaint, pursuant to Ordinance No. 11956, in substantially the form therein set forth, excepting that there is omitted in article 10 of said contract following the word "power" and before the word "referred" appearing on line 14, the following: "obligation for this additional block and will again supply the power." Defendant denies the remaining allegations contained in said paragraph.

## II.

Defendant denies the allegations contained in Paragraph IV of plaintiff's complaint, except it admits that subsequent to March 21, 1944, the plaintiff notified the defendant that it intended to temporarily suspend the operation of the second furnace, claiming the right to do so under article 19 of the contract and that the City denied that the proposed suspension was governed by article 19 and that without prejudice to the claims of either party agreed the plaintiff might suspend the taking of the additional 6000 kilowatt block of power and that the delivery and taking of the additional block of power should be resumed upon 15 days' written notice given by either party to the other and that on April 11, 1944, plaintiff gave written notice that the operation of the second furnace would be so suspended at midnight on April 26, 1944.

## III.

Defendant denies the allegations contained in paragraph V of plaintiff's complaint, except it admits that on February 26, 1945, plaintiff resumed the taking of the additional block of power which had been temporarily suspended on April 26, 1944.

## IV.

Defendant denies the allegations contained in paragraph VI of plaintiff's complaint, excepting it admits that it has billed the plaintiff for electric energy furnished up to and including bill rendered for the month of February, 1946, on the basis that the "contract demand" and the "billing demand" under the contract were 12,500 kilowatts.

## V.

Defendant denies the allegations contained in paragraph VII of plaintiff's complaint, except it admits that the plaintiff has paid all the bills rendered by the defendant during the six months, September, 1945, to February, 1946, under written protest.

HOWARD CAROTHERS,  
CLARENCE M. BOYLE,  
GEORGE F. ABEL,  
J. DEAN BARLINE,

Attorneys for Defendant.

Received copy of foregoing Answer this 20th day of September, 1946.

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 23, 1946.



At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 4th day of February, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

\* \* \*

By direction of the court the following causes are set for trial on the dates indicated:

No. 914 Ohio Ferro-Alloys Corp. vs. City of Tacoma, set for trial April 22. F. D. Metzger represents the plaintiff and Howard Carothers represents the defendant.

\* \* \*

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 22nd day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 22nd day of April, 1947, this cause comes on before the court for trial to the court. F. D. Metzger represents the plaintiff and Clarence Boyle and Howard Carothers represents the defendant. Case is called. Both sides ready. Trial is continued until 2 p.m. Wednesday.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 23rd day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 23rd day of April, 1947, in the above cause F. D. Metzger represents the plaintiff and Clarence Boyle represents the defendant. Cause is continued for trial until 10 a.m. Thursday.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 24th day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 24th day of April, 1947, this cause comes on before the court for trial to the court. F. D. Metzger represents the plaintiff and Clarence Boyle and Howard Carothers represents the defendant. Case is called. Both sides ready. Pre-trial order is signed by the court and filed. Mr. Metzger requests that Attorney R. M. Rybolt be permitted to participate in the trial. Request granted. Opening statement by Mr. Metzger and Mr. Boyle.

At 11:00 a.m. trial suspended. Ex parte matters heard. At 11:07 court recessed. At 11:20 a.m.

court is again in session. All parties present. Trial is resumed. Plaintiff Witness R. L. Cunningham sworn and testifies. Plaintiff Exhibits 1, 2 and 4 admitted. Defendant Exhibits A-1 and A-2 admitted.

At 12:05 p.m. court recessed until 1:45 p.m. At 1:45 p.m. court is again in session. All parties present. Trial is resumed. Plaintiff Witness R. L. Cunningham resumes the witness stand and further testifies. Defendant Exhibit A-3 admitted. Plaintiff Witness William Pritz sworn and testifies. Deposition of R. D. O'Neil read by Mr. Metzger and Mr. Ribault. Plaintiff Exhibits 5, 6, 7, 8, 9, 10, 11, and 12 admitted.

At 4:15 p.m. trial of this cause is continued until Tuesday, April 29, at 10:15 a.m.

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[Title of District Court and Cause.]

### PRE-TRIAL ORDER

As a result of pre-trial conferences heretofore had, whereat the plaintiff was represented by F. D. Metzger, one of its attorneys, and the defendant was represented by Howard Carothers, Corporation Counsel, and Clarence M. Boyle, Assistant Corporation Counsel.

It Is Now and Hereby Ordered as follows:

1. This is an action brought by Ohio-Ferro-Alloys Corporation, an Ohio corporation, against the City of Tacoma, a municipal corporation of the

State of Washington, to recover an alleged overpayment aggregating in excess of \$3,000.00 made by the plaintiff to the defendant city upon bills rendered by said city to the plaintiff for amounts claimed by the city to be due under the term of a written contract between the parties, dated March 21, 1941, for the months of September, 1945, to and including February, 1946, and for a declaration, pursuant to Section 274 D of the Judicial Code of the United States, Title 28, U.S.C.A. Section 400, of the rights and obligations of the parties under said contract, with respect to payment for the second or additional block of 6,000 kw. of electrical energy if and when such additional block shall be supplied by the city.

2. It is admitted that the parties hereto, under date of March 21, 1941, duly entered into a contract in writing pursuant to Ordinance No. 11956 of the City of Tacoma, passed March 10, 1941, for the furnishing by the city and the taking by the plaintiff of the electrical energy required for the operation of a plant to be constructed and operated by the plaintiff in Tacoma; that with the addition or insertion of the words "obligation for this additional block and will again supply the power" following the word "power" and before the word "referred" in Line 17 of Article X of the contract, as set forth in Exhibit "A" to the plaintiff's complaint, said Exhibit "A" is a true and correct copy of said contract, which has been at all times since the date of its execution and now is in full force and effect.

3. It is admitted that in accordance with and

pursuant to said contract, plaintiff constructed the electrometallurgical plant contemplated by said contract and on or about July 7, 1941, commenced taking and has continually since taken from the defendant city the initial block of 6,500 kw. of electric energy, in said contract known and designated as the "contract demand;" and that on or about November 3, 1941, the defendant, in accordance with and pursuant to the terms of said contract, commenced the taking of the additional block of 6,000 kw. of electric energy and continued to take such additional block of power without interruption until April 26, 1944; that on April 26, 1944, plaintiff suspended the taking of said additional block of electric power pursuant to a special arrangement made between it and defendant city, as evidenced by the following correspondence, namely:

Letter of plaintiff to City of Tacoma, dated March 21, 1944.

Letter of defendant city, by R. D. O'Neil, its then Commissioner of Public Utilities, to plaintiff, dated March 29, 1944.

Letter and telegram of plaintiff to defendant city, dated April 8, 1944.

Letter of defendant city to plaintiff, dated April 11, 1944, and

Letters of plaintiff to City of Tacoma, dated April 22 and April 24, 1944.

That such arrangement and the suspension of taking of the second block of power was expressly



without prejudice to the plaintiff's claim that such suspension was caused by causes beyond its control, to-wit, certain orders of the War Production Board, and that under the rights reserved in such mutual arrangement, plaintiff has continued to assert and now asserts that such suspension of taking of the second block of power was occasioned by the cause or causes beyond its control above referred to and if not governed and excused by the aforesaid special arrangement, was governed and excused under the terms of Article XIX of said contract; that the furnishing and taking of said additional block of power was resumed by the parties on or about February 26, 1945; that written notice of the intended suspension of such taking was given by plaintiff to defendant city by letter dated August 21, 1945, but there is in dispute and for determination herein when, and whether after September 21, 1945 and prior to February 26, 1946, the taking of said second block of power was suspended. It is admitted that the actual maximum demand imposed by the plaintiff during October, 1945 was 11,988 kw., and during November, 1945 was 10,472 kw., and that after December 1, 1945, such maximum demand did not exceed 7,560 kw., but plaintiff contends that after November 24, 1945, such maximum demand did not exceed 6,500 kw.

4. That following September, 1945, the city continued to bill Ohio on the basis that the billing demand under the contract of March 21, 1941, con-



tinued to be 12,500 kw. until February 26, 1946. That Ohio has paid all bills as rendered, but under protest and under claim of business compulsion, and claims that under proper interpretation of the contract, billing demand should have been on November 24, 1945, reduced to 6,500 kw., and that because of the city's refusal to reduce said billing demand, contrary to the true intent and proper construction of said contract, plaintiff has overpaid defendant city the sum of \$27,041.10, for which it seeks refund herein. The city asserts that its bills were rendered in strict accordance with said contract, and that there is no refund due.

5. Plaintiff, in addition to seeking recovery of said alleged overpayment, seeks a judgment declaratory of the rights and obligations of the parties in respect to the amount payable under the contract if the furnishing and taking of the additional block of energy of 6,000 kw. should be hereafter resumed.

6. The city has waived and withdrawn its Third Defense and Counter Claim and the same, together with the plaintiff's Reply thereto, should be and are stricken.

Done in Open Court this 24th day of April, 1947.

/s/ CHARLES H. LEAVY,  
U. S. Dist. Judge.

O. K. Clarence M. Boyle of attorneys for defendant. F. D. Metzger of attorneys for plaintiff.

[Endorsed]: Filed April 24, 1947.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 29th day of April, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

Now on this 29th day of April, 1947, this cause comes on before the court for further trial to the court. F. D. Metzger represents the plaintiff and Clarence Boyle and Howard Carothers represents the defendant. Plaintiff Witness William Pritz having been sworn resumes the witness stand and further testifies. Plaintiff Exhibit 3 admitted. Plaintiff Witnesses Murwin Farmin and Robert R. Jones sworn and testify.

At 12:15 p.m., court recessed until 2 p.m. At 2 p.m. court is again in session. Ex parte matters heard. Trial is resumed. All parties present. Plaintiff Witness Robert R. Jones resumes the witness

stand and further testifies. Plaintiff Exhibit 13 admitted. Plaintiff Witness J. W. Weitzenkorn sworn and testifies. Plaintiff Exhibits 14, 15 and 16 admitted.

At 3:20 p.m. court recessed. At 3:30 p.m. court is again in session. Trial is resumed. Plaintiff Witness Samuel Arnold III sworn and testifies. At 4 p.m. plaintiff rests. Defendant Witnesses R. H. B. Robinson, Leonard J. Averill, Sam Claben, Robert McQuarrie, Vern Kent, Murwin Farmin sworn and testify. Defendant Exhibit A-4 admitted.

At 5:25 both sides rest. Cause is continued until Friday, May 2 at 10 a.m. for argument.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 2nd day of May, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

Now on this 2nd day of May, 1947, the above cause comes on before the court for further trial. F. D.

Metzger represents the plaintiff and Clarence Boyle represents the defendant. Argument by Mr. Metzger and Mr. Boyle. The court now finds that the City of Tacoma was forewarned on Jan. 1, 1946 and must refund payment for the power used by the plaintiff for January and February, 1946 the amount to be determined by the city meter reading. At the resumption of power the plaintiff must pay for the 12-month period. Written Findings of Fact and Conclusions of Law to be presented later.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore come on for trial before the undersigned, sitting without a jury, the plaintiff appeared by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant appearing by Howard Carothers, Corporation Counsel, and Clarence M. Boyle, Assistant Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the Court having heard and considered the argument of counsel, doth make the following.

### Findings of Fact

#### I.

The plaintiff, the Ohio Ferro-Alloys Corporation, is and at all times hereinafter mentioned was a corporation organized and existing under and by

virtue of the laws of the state of Ohio, having its principal place of business in the City of Canton in said state.

## II.

The defendant, the City of Tacoma, is and at all times hereinafter mentioned was a municipal corporation of the State of Washington, situate in Pierce County, in said state, and within the Southern Division of the Western District of Washington.

## III.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

## IV.

Under date of March 21, 1941, the parties hereto, pursuant to Ordinance No. 11956 of the defendant city, passed March 10, 1941, and entitled "An ordinance authorizing the execution and delivery of a contract between the City of Tacoma for and on behalf of its Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation, an Ohio corporation, for the sale of electric energy by the city to said corporation, fixing the terms and conditions of such contract," entered into a contract in writing, which is hereinafter referred to as "the contract", a copy of which is in evidence herein marked Plaintiff's Exhibit 5. Said contract has been at all times since and is now in full force and effect, and by its terms, will continue in effect for ten (10) years from the date of its execution.

## V.

In accordance with and pursuant to the contract, plaintiff constructed the electrometallurgical plant contemplated by the contract, and on or about July 7, 1941, commenced taking and continually since has taken from the defendant city the initial block of 6,500 kilowatts of electric energy in the contract known and designated as the "contract demand". On or about November 3, 1941, the plaintiff, in accordance with and pursuant to the terms of the contract, commenced the taking of the additional block of 6,000 kilowatts of electric energy and continued to take such additional block of power without interruption until April 26, 1944.

## VI.

That by letter dated March 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 7, plaintiff, because the operations of its work at its aforesaid electrometallurgical plant had been interrupted or interfered with by governmental regulations, orders or proclamations and particularly by Supplemental Order M-21-a, Direction 4 of the War Production Board of the United States, issued January 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 15, and by Direction 1 to General Preference Order M-18-a of said War Production Board, a copy of which is in evidence herein as Plaintiff's Exhibit 16, gave to the defendant city written notice of its intention to close down operations of its second furnace for reasons beyond its



control and within the scope and purview of Article 19 of the contract. Defendant city declined to admit or recognize that Article 19 of the contract was applicable, but because it was temporarily advantageous and beneficial to the city to reduce its then current sales of electric energy, offered that plaintiff might temporarily suspend the operation of or temporarily shut down its second furnace, subject to resumption of the operation thereof and of taking the required 6,000 kilowatts of electric energy therefor on thirty (30) days (later modified to fifteen days) notice from either party, but without being in any way penalized by such shut down and without prejudice to plaintiff's claims that the shut down of the second furnace and the suspension of the taking of the second block of electric energy was occasioned by causes beyond plaintiff's control and governed and excused by Article 19 of the contract.

## VII.

Plaintiff acted upon defendant's offer and pursuant thereto and in reliance thereon and by special arrangements made between it and defendant city, the plaintiff, on April 26, 1944, closed down the operation of its second furnace and suspended the taking of the second or additional block of power, and resumed the taking thereof on February 26, 1945. That such temporary suspension of the delivery and taking by the defendant city and the plaintiff, respectively, of said additional block of power was advantageous and beneficial to both of the parties hereto.

## VIII.

That under date of August 21, 1945, plaintiff gave to the defendant city written notice of its intention to suspend operation of the second furnace (Plaintiff's Exhibit 1) claiming the right so to do under Article 10 of the contract. That thereupon a dispute arose between the parties, defendant city claiming that notwithstanding the operation of said second furnace should be closed down pursuant to the notice given, plaintiff would continue liable to the city for electric energy on the basis of 12,500 kilowatts of billing demand until it had paid for the equivalent of one year's continuous taking from February 26, 1945 of the additional electric demand of 6,000 kilowatts, which is the load imposed by plaintiff's second furnace, and plaintiff claiming that upon the actual shut down of its second furnace, its liability to make further payments on account of the additional block of energy supplied for the second furnace's operation terminated.

## IX.

Plaintiff completely suspended the operation of its second furnace on November 24, 1945, but defendant city did not have notice of such shut down and consequent cessation of plaintiff's taking of the additional block of energy until December 31, 1945. Notwithstanding such shut down and cessation of taking of the second or additional block of power, the defendant city, in line with its contention above set out, continued to bill plaintiff monthly on the



basis that the billing demand under the contract remained 12,500 kilowatts until February 26, 1946, at which time the billing demand was reduced by the defendant city to 6,500 kilowatts. Plaintiff paid such bills under written protest and under business compulsion to avoid any claim of default which might threaten or result in the loss or forfeiture of the escrow fund which had been established pursuant to Article 11 of the contract. In accordance with the city's billing, plaintiff, on February 10, 1946, paid defendant city \$18,229.17 on the basis of 12,500 kilowatts of demand in January, 1946, and on March 11, 1946, paid the defendant city \$17,604.17 on the basis of 12,500 kilowatts of demand for the first twenty-six days of February, 1946, and of 6,500 kilowatts of demand for the last two days. The highest actual demand shown by the city's meters in January, 1946, was 7,404 kilowatts, and in February, 1946, was 6,300 kilowatts. The highest actual demand shown by plaintiff's meters did not exceed 6,500 kilowatts in either January or February, 1946. The actual amount due the defendant city from the plaintiff for January, 1946, was \$10,797.50, and for February, 1946, was \$9,479.17, and accordingly, plaintiff has overpaid defendant city the total sum of \$15,556.67.

## X.

The contract, Plaintiff's Exhibit 5, was drafted by the defendant city following negotiations between R. D. O'Neil, the then Commissioner of Public Utilities of the City of Tacoma, and representatives of

the plaintiff, and was intended to embody the mutual understanding and agreement reached by and as a result of such negotiations, but is ambiguous, uncertain and susceptible of more than one interpretation with respect to the rates or amounts to be paid by the plaintiff for the second or additional block of 6,000 kilowatts of electric energy in the event the furnishing of such load should be resumed by the defendant city following a suspension of the taking thereof by plaintiff under the right given by subdivision (a), captioned "For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts", of Article 10 of the contract. The mutual understanding and agreement between the said officer of the defendant city and the representatives of the plaintiff, on the basis of which the contract was made and entered into, was that the plaintiff, in addition to the initial block of 6,500 kilowatts of electric energy which the defendant city agreed to furnish and the plaintiff agreed to take for the term of ten years, should have the absolute right, upon giving six months written notice, to be furnished by the defendant city with a second block of 6,000 kilowatts of electric energy; that the plaintiff could drop or suspend the taking of this additional load whenever in its judgment it could not use the same upon giving at least one months written notice, subject to the condition that if the dropping or suspension of such additional load following the initial taking thereof occurred prior to the time that plaintiff had made twelve consecutive monthly payments therefor, plaintiff must

nevertheless continue to pay for the additional load until it had paid for a year's (twelve month's) taking thereof; in other words, that plaintiff's right to be furnished with the additional 6,000 kilowatt load in the first instance was upon the condition that plaintiff would in any event pay defendant city as for a full year's taking thereof; that if having once taken and dropped the additional load of 6,000 kilowatts, plaintiff should desire to resume the taking thereof, the city should have the sole decision as to whether it had surplus power available in sufficient quantity to supply that load, but that if the defendant city agreed to and did resume the furnishing of the additional load, then the plaintiff would not be required to take or pay for it for any particular length of time, but could again drop or suspend the taking thereof on thirty days written notice, and would be required to pay for it as energy used but only for the time that it was actually taken.

Dated this.....day of June, 1947.

-----  
Judge.

From the above and foregoing Findings of Fact, the Court makes the following:

#### Conclusions of Law

1. That this Court has jurisdiction of the parties hereto, and of the subject matter of the action, under Section 24 of the Judicial Code, Title 28, U.S.C.A., Section 41.

2. That the case is one of actual controversy, and the pleadings are appropriate for the Court to declare the rights, liabilities and other legal relations of the parties under the existing contract between them (Plaintiff's Exhibit 5 herein) under Section 274 d of the Judicial Code, Title 28, U.S.C.A., Section 400.

3. That the defendant city wrongfully demanded from the plaintiff excessive payments for and on account of electric energy furnished by the city to the plaintiff during January and February, 1946; plaintiff made the payments so demanded under protest and business compulsion, and accordingly, plaintiff is entitled to recover such excessive payments and to have and recover judgment against the defendant city therefor, to-wit:

For \$7,431.67, with interest at 6% per annum from February 10, 1946, and

For \$8,125.00, with like interest, from March 11, 1946.

4. That the contract, Plaintiff's Exhibit 5, having been drawn by the defendant city, is to be construed strictly against it and in the light of the circumstances leading to its execution, and conformably to the intent of the parties, Subdivision (a) of Article 10 of the contract is to be construed and interpreted and the rights, liabilities and legal rela-

tions of the parties are to be determined for all purposes as though said Subdivision (a) had been originally written and at all times read as follows:

“10. Alteration or Cancellation of Contract Demand:

“(a) For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts.

“The Corporation will be permitted on six (6) months written notice, at any time during the life of this contract, to increase its contract demand to supply one additional furnace using not to exceed six thousand (6,000) kilowatts of power. If, following the date of initial delivery of this additional block of power, conditions in the Corporation's business are depressed so that the Corporation, in its judgment, cannot use the additional power contracted for, the Corporation shall have the right, upon giving the City at least one (1) month's notice in writing, to drop this additional power. If the dropping of this additional block of power shall be after continuous use or taking thereof extending over one year or after use or taking thereof for periods aggregating one year and uninterrupted only by causes beyond control, as defined and provided for in the following Article 19 hereof, then payment for said 6,000 kilowatts of power for the time taken following such full year's billing shall be at the rate of \$17.50 per kilowatt

per year, but prorated according to the fractional part of the year during which said additional block is taken, as provided in Subparagraph (b-3) of Paragraph (b) of Article 4 hereof.

“In the event the Corporation elects to exercise its right of alteration, as provided for in this contract, and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City’s judgment, surplus power is available in sufficient quantity to meet the Corporation’s additional requirements. If and when the Corporation and the City so mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, to be altered downward only by the Corporation, upon at least one (1) month’s written notice to the City. If the furnishing of such additional block of power shall be resumed, the same shall be be furnished and paid for at the rate of \$17.50 per kilowatt per year, but if the taking thereof shall be for a part of a year only, or for a part of a year following one or more full years of continuous taking, then for the part of the year the additional block of power or load is furnished, the \$17.50 per kilowatt rate shall be prorated according to the fractional part of the



year during which said additional load is taken, so that payment shall be made only for the time the city is required to furnish said 6,000 kilowatt load.

“The Corporation may permanently drop its additional 6,000 kilowatt power requirements, at any time, after one year’s billing (12 consecutive months, at the specified rate. In the event the Corporation exercises this right of option, and the City is so notified in writing, the City may reclaim or salvage its equipment originally installed to serve the second furnace and its additional power requirements.

“If and when the Corporation should drop its additional 6,000 kilowatt requirements, either temporary or permanently, and if such dropping shall be after the Corporation shall have once made at least twelve (12) consecutive monthly payments at the \$17.50 per kilowatt annual rate for said 6,000 kilowatt load, then upon such dropping, the ‘ratchet’ clause specified under ‘Billing Demand’ will be dropped proportionately.”

5. The plaintiff is entitled to judgment and decree of this Court declaring the rights, liabilities and legal relations of the parties under the contract to be in accordance with the construction and interpretation of Subdivision (a) of Article 10 of the contract as set forth in the preceding paragraph hereof.



6. The plaintiff is entitled to have and recover judgment against the defendant city for its costs to be taxed herein according to law.

Done in Open Court this.....day of June, 1947.

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Judge.

Presented by:

/s/ F. D. METZGER.

The foregoing Findings of Fact and Conclusions of Law were presented by F. D. Metzger on behalf of the Plaintiff and their adoption moved. Said Findings and Conclusions are disallowed and Exceptions to such disallowance are severally allowed particularly as to Findings IX and X and Conclusions 3, 4 and 5.

June 30, 1947.

/s/ CHAS. H. LEAVY,  
U. S. Dist. Judge.

[Endorsed]: Lodged Jan. 26, 1947.

In the District Court of the United States, Western  
District of Washington, Southern Division

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

### JUDGMENT

This cause having heretofore come on for trial before the undersigned judge of the above entitled court, sitting without a jury, the plaintiff, The Ohio Ferro-Alloys Corporation, appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant, City of Tacoma, appearing by Howard Carothers, then Corporation Counsel, and Clarence M. Boyle, then Assistant Corporation Counsel, now Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the court having heard and considered the argument of counsel and having heretofore made and entered its Findings of Fact and Conclusions of Law, does now and hereby

Order, Adjudge and Decree that plaintiff, The Ohio Ferro-Alloys Corporation, do have and recover judgment against and from the defendant,

City of Tacoma, a municipal corporation of the State of Washington, in the sum of \$15,556.67, together with interest at the rate of six per cent per annum on \$7,431.67 from February 10, 1946, until paid, and on \$8,125.00 from March 11, 1946, until paid, and for its costs and disbursements to be taxed herein according to law.

It Is Further Ordered, Adjudged and Decreed and the court does declare that the rights, liabilities and other legal relations of the parties hereto under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6,000 kilowatts of electric energy are as follows:

If the plaintiff, in said contract of March 21, 1941, and hereinafter called "The Corporation," shall make written request upon the defendant, in said contract and hereinafter called "The City," to resume delivery or again supply said additional block of 6,000 kilowatts of power, and if, upon or following such request, the City, in its judgment, shall determine that it then had surplus power available in sufficient quantity to supply said additional block of power, then the Corporation has the right to be supplied with and the City is obligated and required to again deliver the additional block of 6,000 kilowatts of electric energy upon a firm power basis, and the Corporation is required and obligated to take and pay for said additional block of power at the rate of Seventeen and 50/100 Dollars (\$17.50) net per year per kilowatt of billing demand, payable monthly on the basis of one-

twelfth (1/12) of the annual rate, subject, however, to the Corporation's right to drop or suspend the taking of such additional power at any time upon at least one (1) month's written notice. If the Corporation's taking of such additional load or block of power is for part of a year only or for part of a year following one or more full years taking, then for such part or fraction of a year's taking, the annual Seventeen and 50/100 Dollars (\$17.50) per kilowatt rate shall be prorated so that plaintiff shall, in respect of any taking of said additional block of power for part of a year only, pay therefor that percentage of the annual rate which the part of the year during which said additional load is taken is of a full year.

Done in open court this .... day of June, 1947.

.....

Judge.

Presented by:

/s/ F. D. METZGER.

The foregoing judgment was presented and its entry moved by F. D. Metzger on behalf of the Plaintiff. Such judgment was disallowed and exception allowed Plaintiff.

June 30, 1947.

/s/ CHAS. H. LEAVY,

Judge.

[Endorsed]: Lodged June 26, 1947.

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 30th day of June, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

Now on this 30th day of June, 1947, this cause comes on before the court for presentation of Findings of Fact and Conclusions of Law. F. D. Metzger represents the plaintiff and Clarence M. Boyle represents the defendant. Remarks by Mr. Metzger and Mr. Boyle. Mr. Metzger requests an exception to Findings of Fact Nos. 9 and 10 and to Conclusions of Law Nos. 3, 4 and 5. Exceptions allowed by the court. Findings of Fact and Conclusions of Law and Judgment is now signed by the court and filed.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore come on for trial before the undersigned, sitting without a jury, the plaintiff appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant appearing by Howard Carothers, Corporation Counsel, and Clarence M. Boyle, Assistant Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the Court having heard and considered the argument of counsel, doth make the following

### Findings of Fact

#### I.

The plaintiff, the Ohio Ferro-Alloys Corporation, is and at all times hereinafter mentioned was a corporation organized and existing under and by virtue of the laws of the State of Ohio, having its principal place of business in the City of Canton in said state.

#### II.

The defendant, the City of Tacoma, is and at all times hereinafter mentioned was a municipal corporation of the State of Washington, situate in Pierce County, in said state, and within the Southern Division of the Western District of Washington.

## III.

The matter in controversy, exclusive of interest and costs, exceeds the sum of \$3000.00.

## IV.

Under date of March 21, 1941, the parties hereto, pursuant to Ordinance No. 11956 of the defendant city, passed March 10, 1941, and entitled "An ordinance authorizing the execution and delivery of a contract between the City of Tacoma for and on behalf of its Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation, an Ohio corporation, for the sale of electric energy by the city to said corporation, fixing the terms and conditions of such contract," entered into a contract in writing, which is hereinafter referred to as "the contract," a copy of which is in evidence herein marked Plaintiff's Exhibit 5. Said contract has been at all times since and is now in full force and effect, and by its terms, will continue in effect for ten (10) years from the date of its execution.

## V.

In accordance with and pursuant to the contract, plaintiff constructed the electrometallurgical plant contemplated by the contract, and on or about July 7, 1941, commenced taking and continually since has taken from the defendant city the initial block of 6,500 kilowatts of electric energy in the contract known and designated as the "contract demand." On or about November 3, 1941, the plaintiff, in



accordance with and pursuant to the terms of the contract, commenced the taking of the additional block of 6,000 kilowatts of electric energy and continued to take such additional block of power without interruption until April 26, 1944.

## VI.

That by letter dated March 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 7, plaintiff, claiming the operations of its work at its aforesaid electrometallurgical plant had been interrupted or interfered with by governmental regulations, orders or proclamations and particularly by Supplemental Order M-21-a, Direction 4 of the War Production Board of the United States, issued January 21, 1944, a copy of which is in evidence herein as Plaintiff's Exhibit 15, and by Direction 1 to General Preference Order M-18-a of said War Production Board, a copy of which is in evidence herein as Plaintiff's Exhibit 16, gave to the defendant city written notice of its intention to close down operations of its second furnace for reasons beyond its control and within the scope and purview of Article 19 of the contract. Defendant city declined to admit or recognize that Article 19 of the contract was applicable, but because it was temporarily advantageous and beneficial to the city to reduce its then current sales of electric energy, offered that plaintiff might temporarily suspend the operation of or temporarily shut down its second furnace, subject to resumption of the operation

thereof and of taking the required 6,000 kilowatts of electric energy therefor on thirty (30) days (later modified to fifteen days) notice from either party, but without being in any way penalized by such shutdown and without prejudice to plaintiff's claims that the shutdown of the second furnace and the suspension of the taking of the second block of electric energy was occasioned by causes beyond plaintiff's control and governed and excused by Article 19 of the contract.

## VII.

Plaintiff acted upon defendant's offer and pursuant thereto and in reliance thereon and by special arrangements made between it and defendant city, as evidenced by the following correspondence, namely:

Letter of plaintiff to City of Tacoma, dated March 21, 1944, Plaintiff's Exhibit 7.

Letter of defendant city, by R. D. O'Neil, its then Commissioner of Public Utilities, to the plaintiff, dated March 29, 1944, Plaintiff's Exhibit 8.

Telegram and letter of plaintiff to defendant, dated April 8, 1944, Plaintiff's Exhibits 9 and 10.

Letter of defendant city to plaintiff, dated April 11, 1944, Plaintiff's Exhibit 11, and

Letters of plaintiff to City of Tacoma, dated April 22 and April 24, 1944, respectively, Plaintiff's Exhibits 12 and 14,

on April 26, 1944, the plaintiff closed down the operation of its second furnace and suspended the taking of the second or additional block of power, and resumed the taking thereof on February 26, 1945. That such temporary suspension of the delivery and taking by the defendant city and the plaintiff, respectively, of said additional block of power was advantageous and beneficial to both of the parties hereto.

### VIII.

That under date of August 21, 1945, plaintiff gave to the defendant city written notice of its intention to suspend operation of the second furnace (Plaintiff's Exhibit 1) claiming the right so to do under Article 10 of the contract. That thereupon a dispute arose between the parties, defendant city claiming that notwithstanding the operation of said second furnace should be closed down pursuant to the notice given, plaintiff would continue liable to the city for electric energy on the basis of 12,500 kilowatts of billing demand until it had paid for the equivalent of one year's continuous taking from February 26, 1945, of the additional electric demand of 6,000 kilowatts, which is the load imposed by plaintiff's second furnace, and plaintiff claiming that upon the actual shutdown of its second furnace, its liability to make further payments on account of the additional block of energy supplied for the second furnace's operation terminated.

## IX.

Plaintiff completely suspended the operation of its second furnace on November 24, 1945, but defendant city did not have notice of such shutdown and consequent cessation of plaintiff's taking of the additional block of energy until December 31, 1945. Notwithstanding such shutdown and cessation of taking of the second or additional block of power, the defendant city, in line with its contention above set out, continued to bill plaintiff monthly on the basis that the billing demand under the contract remained 12,500 kilowatts until February 26, 1946. Plaintiff paid such bills under written protest and under business compulsion to avoid any claim of default which might threaten or result in the loss or forfeiture of the escrow fund which had been established pursuant to Article 11 of the contract. In accordance with the city's billing, plaintiff, on February 10, 1946, paid defendant city \$18,229.17 on the basis of 12,500 kilowatts of demand in January, 1946, and on March 11, 1946, paid the defendant city \$17,604.17 on the basis of 12,500 kilowatts of demand for the first twenty-six days of February, 1946, and of 6,500 kilowatts of demand for the last two days. The highest actual demand occurring subsequent to December 31, 1945, during the months of January and February, 1946, was 7404 kilowatts, which demand was established in the month of January, 1946; that in accordance with paragraph 7 of the contract (Plaintiff's Exhibit 5) which provides that the billing demand for any month shall not be less than the highest actual

demand which occurred during the immediately preceding eleven months, except as specified to the contrary under "Alteration or Cancellation of Contract Demand," the billing demand for each of the months of January and February, 1947, was thereby established as 7404 kilowatts. The actual amount due the defendant city from the plaintiff for January 1946, was \$10,797.50, and for February, 1946, \$10,797.50, and accordingly the plaintiff has overpaid defendant city the total sum of \$14,238.34 on account of said payments.

## X.

The contract, Plaintiff's Exhibit 5, was drafted by the defendant city following negotiations between R. D. O'Neil, the then Commissioner of Public Utilities of the City of Tacoma, and other representatives of the City of Tacoma, and representatives of the plaintiff and was intended to embrace the mutual understanding and agreement reached by and as a result of such negotiations and is unambiguous and certain and susceptible to only one interpretation with respect to the rates or amounts to be paid by the plaintiff for the second or additional block of 6,000 kilowatts of electrical energy in the event the furnishing of such load should be resumed by the defendant city following a suspension of the taking thereof by plaintiff under the right given by subdivision (a), captioned "For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts," of

Article 10 of the contract. The true intent of said agreement and of said contract was that the plaintiff, in addition to the initial block of 6,500 kilowatts of electric energy which the defendant city agreed to furnish and the plaintiff agreed to take for the term of ten years, should have the absolute right, upon giving six months written notice, to be furnished by the defendant city by a second block of 6,000 kilowatts of electric energy, that the plaintiff could drop or suspend the taking of this additional load whenever in its judgment it could not use the same upon giving at least one month's written notice, subject to the condition that if the dropping or suspension of such additional load following the initial taking thereof or following any subsequent new taking thereof, occurred prior to a time that plaintiff had made twelve consecutive monthly payments therefor immediately preceding the dropping or suspension of such additional load, plaintiff must nevertheless continue to pay for the additional load until it had paid for a year's (twelve months') taking thereof immediately preceding the dropping or suspension thereof. In other words, that the plaintiff's right to be furnished with the additional 6,000 kilowatt load was upon the condition that in the event plaintiff would pay the city for a full year's taking thereof following the initial taking and following any subsequent taking where said load had been discontinued subsequent to the initial taking and that if, after having once taken and dropped said additional load the plaintiff



should desire to resume the taking thereof, the city should have the sole decision as to whether it had sufficient surplus power to supply that load.

Dated this 30th day of June, 1947.

CHARLES H. LEAVY,  
U. S. District Judge.

From the foregoing Findings of Fact, the Court makes the following

Conclusions of Law

1. That this Court has jurisdiction of the parties hereto, and of the subject matter of the action, under Section 24 of the Judicial Code, Title 28, U.S.C.A., Section 41.

2. That the case is one of actual controversy, and the pleadings are appropriate for the Court to declare the rights, liabilities and other legal relations of the parties under the existing contract between them (Plaintiff's Exhibit 5 herein) under Section 274d of the Judicial Code, Title 28, U.S. C.A., Section 400.

3. That the defendant city wrongfully demanded from the plaintiff excessive payments for and on account of electric energy furnished by the city to the plaintiff during January and February, 1946; plaintiff made the payments so demanded under protest and business compulsion, and accordingly, plaintiff is entitled to recover such excessive pay-



ments and to have to recover judgment against the defendant city therefor, to-wit:

For \$7,431.67, with interest at 6% per annum from February 10, 1946, and

For \$6,806.67, with like interest, from March 11, 1946.

4. That said judgment provide that the correct billing demand under said contract up to and including December 31, 1945, was 12,500 kilowatts; that on said date the plaintiff discontinued the second or 6,000 kilowatt block of power mentioned in said contract; that in January, 1946, the actual demand under the contract for the initial 6,500 kilowatt block of power was 7404 kilowatts and that in determining the payment to be made under the terms of the contract for January and February, 1946, the contract demand remained at 7404 kilowatts and that the correct billing demand for each of said months was 7404 kilowatts.

5. That said judgment further provide that Article 10 of the contract, taken together with all other terms thereof, be construed to mean that if the defendant, after appropriate notice and demand from the plaintiff, resumes delivery of the second or additional block of power and the plaintiff thereafter again suspends the taking of said additional block within one year of such resumption, the plaintiff shall be obligated to pay for the increased load for one full year from the date of such resumption of its taking and that at any time or

times the taking of such additional block of power is resumed after suspension thereof, except for a suspension occurring under the provisions of Article 19 of said contract, payment for energy shall be on an annual basis at the contract demand of 12,500 kilowatts or the billing demand, whichever is greater, unless such suspension occurs after a year's continuous billing and payment therefor under a contract demand of 12,500 kilowatts immediately preceding the suspension.

6. That the plaintiff is entitled to have and recover judgment against the defendant city for its costs herein taxed according to law.

Done in open Court this 30th day of June, 1947.

CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

CLARENCE M. BOYLE,  
Of attorneys for Defendant.

[Endorsed]: Filed June 30, 1947.

In the District Court of the United States, Western  
District of Washington, Southern Division

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

### JUDGMENT

This cause having heretofore come on for trial before the undersigned judge of the above entitled court, sitting without a jury, the plaintiff, The Ohio Ferro-Alloys Corporation, appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the defendant, City of Tacoma, appearing by Howard Carothers, then Corporation Counsel, and Clarence M. Boyle, then Assistant Corporation Counsel, now Corporation Counsel, and evidence, both oral and documentary, having been received on behalf of both the parties, and the court having heard and considered the argument of counsel and having heretofore made and entered its Findings of Fact and Conclusions of Law, does now and hereby

Order, Adjudge and Decree that plaintiff, The Ohio Ferro-Alloys Corporation, do have and recover judgment against and from the defendant,

City of Tacoma, a municipal corporation of the State of Washington, in the sum of \$14,238.34, together with interest at the rate of six per cent per annum on \$7,431.67 from February 10, 1946, until paid, and on \$6,806.67 from March 11, 1946, until paid, and for its costs and disbursements to be taxed herein according to law, said amounts being the amount overpaid by the plaintiff to the defendant under the contract hereinafter referred to up to and including February, 1946.

It Is Further Ordered, Adjudged and Decreed and the court does hereby declare that the rights, liabilities and other legal relations of the parties hereto under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6,000 kilowatts of electric energy are as follows:

If the plaintiff, in said contract of March 21, 1941, and hereinafter called "The Corporation," shall make written request upon the defendant, in said contract and hereinafter called "The City," to resume delivery or again supply said additional block of 6,000 kilowatts of power, and if, upon or following such request, the City, in its sole judgment, shall determine that it then had surplus power available in sufficient quantity to supply said additional block of power, then the Corporation has the right to be supplied with and the City is obligated and required to again deliver the additional block of 6,000 kilowatts of electric energy upon a firm power basis, and the Corporation is

required and obligated to take and pay for said additional block of power at the annual rate of Seventeen and 50/100 Dollars (\$17.50) net per year per kilowatt of billing demand, payable monthly on the basis of one-twelfth ( $1/12$ ) of the annual rate, subject, however, to the Corporation's right to drop or suspend the taking of such additional power at any time upon at least one (1) month's written notice; provided that payment therefor shall be made for at least one year from the resumption of the taking of such additional power; and provided further that if the Corporation's taking of such additional load or block of power is for part of a year immediately following one or more full year's taking immediately preceding the dropping or suspension of the taking of said additional block, then and for such part or fraction of a year's taking the annual \$17.50 per kilowatt rate shall be prorated so that plaintiff shall in respect of any taking of said additional block of power for part of a year following twelve months or more taking of said additional block of power immediately preceding such dropping or suspension, pay therefor that percentage of the annual rate which the part of the year during which said additional load is taken, is of a full year.

It Is Further Ordered, Adjudged and Decreed that the taking of said additional block of 6,000 kilowatts of power, commenced on February 26, 1945, was discontinued on the 31st day of December, 1945, and that there was established as the billing demand for the initial or 6,500 kilowatt load

in the month of January, 1946, a billing demand of 7404 kilowatts, which billing demand, under the terms of the contract, is the correct billing demand for the months of January and of February, 1946.

Done in open Court this 30th day of June, 1947.

/s/ CHAS. H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ CLARENCE M. BOYLE,  
Of Attorneys for Defendant.

[Endorsed]: Filed June 30, 1947.

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[Title of District Court and Cause.]

### MOTION FOR A NEW TRIAL

Comes now the plaintiff, by his undersigned attorneys of record, and moves the court to set aside the judgment entered herein on June 30, 1947, and grant a new trial of the above-entitled action upon the following grounds:

1. Insufficiency of the evidence to justify:

(a) So much of the Court's Finding No. IX as finds that the billing demand for February, 1947, was 7404 kilowatts or any amount in excess of 6500 kilowatts; as finds that the amount actually due to the defendant City of Tacoma from the plaintiff was \$10,797.50, or any amount in excess of \$9,479.17; and so much as finds that the plaintiff has overpaid the defendant city the total sum of \$14,238.34 or any amount less than \$15,556.67;



(b) The whole and each and every part of the Court's Finding No. X.

2. Error in law occurring at the trial, in the following respects:

(a) Error in making and entering so much of Conclusion of Law No. 3 as provides that the plaintiff is entitled to recover judgment against the defendant City for but \$6806.67 on account of plaintiff's overpayment for the month of February, 1946, instead of \$8,125.00;

(b) In making and entering its Conclusion of Law No. 4 and so much thereof as finds that the correct billing demand for February, 1946, was 7404 kilowatts;

(c) In making and entering its Conclusion of Law No. 5 and the whole and each and every part thereof;

(d) In making and entering its judgment, and particularly those portions thereof which (a) limit the plaintiff's recovery on account of its overpayment for the month of February, 1946, to \$6808.67, with interest at six per cent per annum from March 11, 1946, until paid; (b) which declares the rights, liabilities and other legal relations of the parties under the contract between them dated March 21, 1941, in respect of the resumption and delivering and taking of the additional 6000 kilowatts of electrical energy; and (c) which decrees that the correct billing demand for the month of February, 1946, was 7404 kilowatts.

F. D. METZGER,

Of Metzger, Blair, Gardner & Boldt, Attorneys for Plaintiff.



Copy received July 1, 1947.

/s/ CLARENCE M. BOYLE,  
Of Attys. for Defendant.

[Endorsed]: Filed July 1, 1947.

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At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 7th day of July, 1947, the Hon. Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the journal record of said Court:

Civil Case No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation,

Plaintiff,

vs.

CITY OF TACOMA, a Municipal Corporation,  
Defendants.

Now on this 7th day of July, 1947, this cause comes on before the court for hearing on motion for new trial. J. Dean Barline and Clarence Boyle attorneys representing the defendant present an order denying motion for new trial, which is signed by the court and filed.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR  
NEW TRIAL

Plaintiff's motion for a new trial in the above entitled cause having been regularly brought on for hearing on the . . . . day of July, 1947, before the Honorable Chas. H. Leavy, Judge of the above entitled Court, the Court having fully considered the same and being advised in the premises and it appearing to the Court that said motion is not well taken and should be denied, Now, Therefore, it is hereby

Ordered that plaintiff's motion for a new trial be and the same hereby is denied, to all of which the plaintiff excepts and exception allowed.

Dated this 7th day of July, 1947.

CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ CLARENCE M. BOYLE,  
/s/ J. DEAN BARLINE,  
Of Attorneys for Defendant.

Copy received and form approved for entry, July 31, 1947.

F. D. METZGER,  
Of Attys. for Plaintiff.

[Endorsed]: Filed July 7, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The Ohio Ferro-Alloys Corporation, an Ohio corporation, plaintiff in the above-entitled action, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment made and entered in the above-entitled court and cause on June 30, 1947, and particularly from that part thereof wherein and whereby the above named District Court declares the rights, liabilities and other legal relations of the parties to the action under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6000 kilowatts of electric energy.

Dated at Tacoma, Washington, this 29th day of July, 1947.

F. D. METZGER,

R. M. RYBOLT,

Attorneys for Appellant.

DAY, COPE, KETTERER.

RALEY & WRIGHT,

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

Copy of the within and foregoing Notice of Appeal mailed to Corporation Counsel, City of Tacoma, City Hall, Tacoma, Washington, this 30th day of July, 1947.

/s/ E. E. REDMAYNE,

Deputy Clerk.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents, That we, The Ohio Ferro-Alloys Corporation, an Ohio corporation, plaintiff herein, as Principal, and Hartford Accident and Indemnity Company, a corporation organized under the laws of the State of Connecticut and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto City of Tacoma, defendant herein, in the full and just sum of Two Hundred Fifty Dollars (\$250.00) lawful money of the United States, for the payment of which sum well and truly to be made to said Defendant we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that Whereas the judgment of the above entitled Court was made and entered in the above entitled cause, on June 30, 1947, and said The Ohio Ferro-Alloys Corporation is about to file with said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and particularly from that part thereof wherein and whereby said District Court declares the rights, liabilities and other legal relations of the parties to the action under the contract between them dated March 21, 1941, in respect of a resumption of delivery and taking of the additional block of 6000 kilowatts of electric energy;

Now, Therefore, the condition of this obligation is such that if said The Ohio Ferro-Alloys Corporation shall pay all costs if said appeal is dismissed or said judgment affirmed or such costs as the appellate court may award if said judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the above bounden principal and surety have executed the foregoing bond this 29th day of July, 1947.

THE OHIO FERRO-ALLOYS  
CORPORATION.

By F. D. METZGER,  
R. M. RYBOLT,  
Its Attorneys of Record.

HARTFORD ACCIDENT AND  
INDEMNITY COMPANY.

[Seal] By /s/ HAROLD N. MANN,  
Its Attorney in Fact.

State of Washington.  
County of Pierce—ss.

On this 29th day of July, 1947, personally appeared before me Harold N. Mann, to me known to be the Attorney-in-Fact of Hartford Accident and Indemnity Company, the corporation that executed the within and foregoing instrument, as surety, and acknowledged said instrument to be the free and

voluntary act and deed of said Hartford Accident and Indemnity Company for the uses and purposes therein mentioned and on oath stated that he was authorized to execute the same for and on behalf of said corporation, and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ VIVIAN PARENT,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

[Endorsed]: Filed July 29, 1947.

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH  
APPELLANT INTENDS TO RELY

Comes now the Appellant, The Ohio Ferro-Alloys Corporation, and states that on the appeal of the above-entitled cause it intends to rely on the following points:

1. That the contract between the parties, dated March 21, 1941 (Plaintiff's Exhibit 5 herein), is ambiguous and uncertain and, having been drawn by the defendant City, is to be construed strictly against it. In the light of the circumstances leading to its execution and to conform to the intent of the

parties in making and entering into such contract, the provisions of said contract (particularly the provisions of subdivision (a) of Article 10 thereof) dealing with a resumption of delivery and taking of the additional block of 6000 kilowatts of electric energy should be interpreted and construed to mean and provide that in the events which had happened prior to the commencement of the action, if following a written request by the plaintiff upon the defendant to resume delivery or again supply said additional block of 6000 kilowatts of electric energy, the defendant city in its sole judgment shall determine that it then has surplus power available in sufficient quantity to supply said additional block of power, then the plaintiff corporation has the right to be supplied with and the City is obligated and required to again deliver said additional block of 6000 kilowatts of electric energy upon a firm power basis; and plaintiff corporation is required and obligated to take and pay for said additional block of power at the annual rate of \$17.50 net per year per kilowatt of billing demand, payable monthly on the basis of one-twelfth of the annual rate; provided, however, that plaintiff corporation has the right to drop or suspend the taking of such additional power at any time following the resumption of the delivery thereof, upon at least one month's written notice, and if the resumed delivery and taking of said additional block of power shall be for part of a year only, i.e., for less than twelve



calendar months' continuous taking or for part of a year following a full year's taking, then and for such part or fraction of a year's taking the annual \$17.50 per kilowatt rate shall be prorated so that the plaintiff in respect of any taking of said additional block of power for any such part or fraction of a year shall pay therefor that percentage of the annual rate which the part of the year during which said additional load is taken is of a full year.

2. The District Court erred in holding and declaring that if a resumed taking of the additional load of 6000 kilowatts of electric energy was for less than twelve consecutive months, i.e., for part of a year only, the plaintiff was nevertheless required to pay therefor the full annual rate as for a full year's taking.

Dated this 8th day of August, 1947.

F. D. METZGER,

R. M. RYBOLT,

Attorneys for Appellant.

DAY, COPE, KETTERER,

RALEY & WRIGHT,

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

[Endorsed]: Filed Aug. 8, 1947.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

Appellant, The Ohio Ferro-Alloys Corporation, hereby designates the following as the portions of the record, proceedings and evidence in this cause to be contained in the record on appeal, namely:

1. The original complaint, filed July 16, 1946.
2. Defendant's answer and cross-complaint, filed September 23, 1946.
3. Plaintiff's reply, filed March 21, 1947.
4. Plaintiff's request for admissions, filed April 18, 1947.
5. Pre-trial order entered April 24, 1947.
6. Reporter's transcript of the evidence and proceedings taken and had at the trial and hearings of this action, on April 24 and 29 and May 2, 1947, two copies of which transcript are filed herewith.
7. Oral decision of the United States District Judge, rendered May 2, 1947, if such decision is not included in the Reporter's transcript of the evidence.
8. Plaintiff's proposed findings of fact and conclusions of law and judgment, with all plaintiff's exceptions to the disallowance thereof.
9. Court's findings of fact and conclusions of law, with all exceptions taken by plaintiff thereto.
10. Court's judgment made and entered June 30, 1947, with all plaintiff's exceptions thereto.
11. Plaintiff's motion for new trial, filed July 1, 1947.

Order denying motion for new trial, entered July 7, 1947.

13. All Clerk's journal entries relative to proceedings had and judgments made and entered in the above entitled cause, including but not limited to the journal entries for the following dates: February 4, 1947; April 22, 1947; April 23, 1947; April 24, 1947; April 29, 1947; May 2, 1947; June 30, 1947, and July 7, 1947.

14. Notice of appeal, filed July 29, 1947.

15. Bond for costs on appeal, filed July 29, 1947.

16. Statement of points on which appellant, The Ohio Ferro-Alloys Corporation, intends to rely on appeal.

17. Any and all stipulations which may be hereafter filed regarding (a) the record on appeal or (b) the incorporation of exhibits in the transcript of the record or the transmission of original exhibits to the Circuit Court of Appeals for the Ninth Circuit; and any order or orders which may entered upon such stipulations or any of them.

18. Designation of contents of record on appeal.

Dated this 8th day of August, 1947.

F. D. METZGER,

R. M. RYBOLT,

Attorneys for Appellant.

DAY, COPE, KETTERER,

RALEY & WRIGHT.

METZGER, BLAIR, GARDNER  
& BOLDT,

Of Counsel for Appellant.

The undersigned, attorneys for defendant City of Tacoma, hereby acknowledge receipt of copy of the foregoing Designation of Contents of Record on Appeal and of the Statement of Points on which the Appellant intends to Rely, being Item 16 of said Designation.

Dated this 8th day of August, 1947.

/s/ CLARENCE M. BOYLE,

/s/ J. DEAN BARLINE,

Attorneys for Defendant,  
City of Tacoma.

[Endorsed]: Filed Aug. 8, 1947.

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[Title of District Court and Cause.]

### STIPULATION FOR TRANSMISSION OF ORIGINAL EXHIBITS

It Is Hereby Stipulated by and between the Ohio Ferro-Alloys Corporation, plaintiff herein, and the City of Tacoma, defendant, by and through their respective undersigned attorneys, that all of the original exhibits which were offered and received in evidence, consisting of Plaintiff's Exhibits 1 to 16, inclusive, and Defendant's Exhibits A-1 to A-4, inclusive, being twenty exhibits in all, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that an order to that effect may be entered by the above-entitled Court upon the presentation and filing of

this stipulation and without other notice, and that none of said exhibits, nor any copies or reproductions thereof need be attached to or incorporated in either the appellant's condensed statement of the testimony or the reporter's transcript of the testimony.

Dated this 28th day of August, 1947.

/s/ R. M. RYBOLT,  
/s/ F. D. METZGER,  
METZGER, BLAIR, GARDNER  
& BOLDT,  
Attorneys for Plaintiff.

/s/ CLARENCE M. BOYLE,  
Corporation Counsel,  
Attorney for Defendant.

[Endorsed]: Filed Aug. 28, 1947.

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[Title of District Court and Cause.]

### ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

Pursuant to the written stipulation of the parties on file herein,

It Is Ordered that the originals of all exhibits offered and received in evidence, to-wit: Plaintiff's Exhibits 1 to 16, inclusive, and Defendant's Exhibits A-1 to A-4, inclusive, shall be forwarded by the Clerk of this Court to the Clerk of the United

States Circuit Court of Appeals for the Ninth Circuit with the transcript of record on appeal.

Dated this 28th day of August, 1947.

/s/ CHARLES H. LEAVY,  
U. S. District Judge.

Presented by:

/s/ F. D. METZGER.

[Endorsed]: Filed Aug. 28, 1947.

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[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 93, inclusive, together with the original Reporter's Transcript of the Proceedings, and Plaintiff's original exhibits, numbered 1 to 16, inclusive, and Defendant's original exhibits, numbered A-1 to A-4, inclusive, comprise a full, true and correct record of so much of the papers, record and proceedings in Cause No. 914, The Ohio Ferro-Alloys Corporation, a corporation, Plaintiff, vs. City of Tacoma, a municipal corporation, Defendant, as required by Plaintiff's Designation of the Contents of the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Record on Appeal from the Judgment of

the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit the original Reporter's Transcript of Proceedings and the original exhibits above referred to.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Record on Appeal, to-wit:

Appeal fee .....	\$ 5.00
Clerk's fee for preparation of certified record .....	14.80
	<hr/>
	\$19.80

and that said amount has been paid in full to me by the Appellant herein.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of this Court in the City of Tacoma, in the Western District of Washington, this 3rd day of September, 1947.

[Seal]

MILLARD P. THOMAS,  
Clerk.

By /s/ E. E. REDMAYNE,  
Deputy.



In the District Court of the United States  
Western District of Washington, Southern  
Division

No. 914

THE OHIO FERRO-ALLOYS CORPORATION,  
a corporation,

Plaintiff,

vs.

CITY OF TACOMA, a municipal corporation,  
Defendants.

## TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 24th day of April, 1947, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the Plaintiff appearing by its officers and by R. M. Rybolt and F. D. Metzger, its attorneys, and the Defendant, City of Tacoma, appearing by Howard Carothers, then Corporation Counsel, and Clarence M. Boyle, then Assistant Corporation Counsel, now Corporation Counsel.

Whereupon the following proceedings were had and done, to-wit:

The Court: Docket 914, The Ohio-Ferro-Alloys Corporation versus City of Tacoma, are the parties ready for trial?

Mr. Metzger: The plaintiff is ready, your Honor.

Mr. Boyle: The defendant is ready.

The Court: I have read, gentlemen, this pre-trial order submitted as a result of pre-trial conferences, and I find it to be in order and have accordingly signed it, and it will be filed, and the case will be tried upon the issues as there made. However, I think I shall request a statement from counsel representing the parties, because it might help to clarify this matter in the mind of the Court.

The issues, apparently from this pre-trial order, are not complicated issues. The facts, perhaps, in determining what they are might be somewhat difficult. If I understand the issues as presented by the pre-trial order, they are first as to whether there has been an overpayment by the plaintiff under what is designated as business compulsion by reason of a difference in the interpretation of the obligations growing out of this contract; and second, a declaratory judgment is sought as to what the rights of the respective parties would be in the future. Am I correct in that? [1\*]

Mr. Metzger: That is correct, your Honor.

The Court: Now, if you care to, Mr. Metzger, I'll hear from you, or——

Mr. Metzger: If your Honor please, before I make this statement, may I take the liberty of presenting to the Court, Mr. R. M. Rybolt, of Canton, Ohio, an Ohio lawyer who is of counsel for the Company at their home office, for the

plaintiff. I do not know that he will take any active part in the trial, but if he desires to, I ask for him the courtesy of being permitted to address the Court.

The Court: Your request will be granted, and the Minutes may show that he is recognized as a member of this Bar, for the purpose of this case.

Mr. Rybolt: Thank you, your Honor.

Mr. Metzger: Your Honor please, I believe the simplest way of making a statement of the issues and what the plaintiff expects to prove, is to treat this matter chronologically.

In the early spring of 1941, after negotiations, commencing in December, a contract was entered into, which is attached to the Complaint as Exhibit A, and is admitted with a slight correction, which is agreed to between the parties here. That contract provided for the furnishing of electrical energy by the City in two [2] different blocks; the first block, 6500 kilowatts, the furnishing of that was to go over a ten-year period. It was a firm contract, the City would furnish, the Company would take, as soon as the plant of the plaintiff had been constructed and was ready for operation. The plant was put in operation, the date is immaterial, but quite soon after, the contract was signed, a matter of a very few months.

Now, to insure and guarantee to the City, that The Ohio Ferro-Alloys Company would not be a "war baby" and come here for the war only and go away, the contract required—provided for an escrow fund.

The Court: The contract, however, was entered into prior to the declaration of war?

Mr. Metzger: Yes.

The Court: But while the defense program was under way.

Mr. Metzger: Yes. And that escrow fund relates only to what we call the first block of power, 6,500 kilowatts. In that first block of power, there is no controversy here concerning it; I mention it only in passing, so the Court will understand the situation. The escrow fund has been established, and I think was completely established, giving the City some ninety thousand or one hundred thousand dollars as security, [3] before the events which give rise to the controversy here, occurred.

Now this contract, in addition to providing for this first block of power, provided that any time upon request of the Corporation the City would furnish an additional block of power to operate a second furnace. That block of power was to be 6,000 kilowatts. And then it provided that that second block of power might be dropped or suspended, and might again be resumed, the taking of it, and the furnishing of it might again be resumed under certain conditions. I will have to go into those conditions more at length as we go along.

Well, in accordance with the contract, the second block of power was requested almost immediately after the contract was entered into; and the City commenced to furnish it, the plaintiff commenced to take it in November of 1941, and they continued

to take it without interruption for a matter of some twenty-seven months, or until April of 1944.

The Ohio Ferro-Alloys, in their operations here, manufacture ferro chrome, which is used in the production of steel, and was subject in the sale or marketing of their products—was subject to allocation by the War Production Board, and was subject otherwise—being an essential war product used in the furtherance [4] of the war program—was subject to other orders of the War Production Board. In the latter part of 1943 and January, I think, of 1944, the War Production Board issued orders relating to, or the allocation of this product; and the January order required the steel companies to use, not to use, I should say, scrap steel containing alloys, note that down, rather than buy new, freshly-produced alloys, that caused a complete interruption almost, of the business of The Ohio Ferro-Alloys. And so early in March—not early in March—but in March of 1944, the plaintiff requested the City—informed the City that their operations had been interrupted or interfered with by these orders of the War Production Board; and as a consequence they would be required to suspend operations, and that they were claiming the benefit of Article XIX of the contract, which is a clause permitting suspension for causes beyond control. It's a very broad article. It covers—it's a much broader provision than is commonly found in these clauses—"beyond control" clauses. Your Honor says he has read it—

The Court: Yes.

Mr. Metzger: —and I won't read it at length. It operates—is a mutual clause, the City has the benefit on the one side, and the plaintiff on the other; and it says: "If the operation of the Corporation's work is [5] suspended, interrupted, or interfered with, for any cause reasonably beyond its control," including, but not by way of limitation, not only breakdown of equipment, strikes, and acts of God, war in the United States, but then it says, "Governmental orders—Governmental regulations, orders or proclamations, priorities, or other causes beyond the control of the parties, the City need not deliver power hereunder, and the Corporation need not accept or pay for such power for such period of time and to the extent that such suspension, interruption, or interference makes it reasonably impractical to use such power, and monthly bills for any period, including any such suspension, interruption, or interference shall be prorated." As I say, the Company in the latter part of March, 1944, sought the benefit of this clause to suspend operation of the second furnace. The City took the position that Article XIX was not applicable, but said the City's situation with regard to its supply of power is such that we will consent and agree that you may suspend the taking of power for the second furnace, subject to renewing the taking of that power on thirty days' notice by either party. The City deemed it to their advantage as well as to the Corporation's advantage to permit the suspension of power at that time without—outside the contract, as a special arrange-



ment; and following that arrangement, [6] or proposal, or offer by the City, the Corporation, the plaintiff, did suspend the taking of power for the second furnace. The suspension was made on the 26th of April, 1944, and it was again resumed in September, 1944. Maybe I've got the years wrong, but I think that's correct. It was resumed in February—I am corrected—it was resumed nearly a year later, in February of 1945, and the taking continued thereafter.

In August of 1945, the Corporation gave notice, pursuant to Article X of the contract, that it intended to suspend operation of the second furnace; and then, a controversy arose as to the liability under the contract of the Plaintiff, if it did so suspend. This controversy was carried on by correspondence for some little period. It was initiated through oral conversations, in which the City's representatives stated that they did not know and the contract meant, or how it should be applied, in that particular instance, and that they would have to take advice from the Corporation Counsel. It culminated in the letter, I think, of October 13, 1945, in which the City advised the Corporation that they would stand on their position regarding the Corporation's liabilities.

Now, the facts will show—the evidence will show that following the giving of this notice of intent to suspend, the operation of the second furnace was [7] suspended, I think about September 4th. In other words, about two weeks after that notice was given. Then when this controversy, as to the



interpretation of the contract arose, and while it was pending and prior to the City's final announcement of its position, the operation of the second furnace was resumed for two weeks. It was closed down finally on the 8th of October, which was before the City's final announcement—or position had been announced; and it was not thereafter resumed for productive purposes. By some mischance or error, the evidence will probably show what, I don't know that there is any full explanation of it, there was one day in November—I think the 24th day of November, when the second furnace was not put into production or operation, but it was warmed up, while the other furnace was in operation. Well, after the 24th day of November, 1945, and since that time until today, only one furnace has operated.

Now, the City, in accordance with its decision announced in this letter of October 13, 1945, has taken the position that when Ohio Ferro-Alloys resumed the operation of the second furnace in February of 1945, they were obligated to pay for a full year, whether they took it or not. The Corporation believes, under a proper interpretation of the contract, that having taken the [8] second block of power for more than one year continuously when it was first put on, that when it put on—the furnace—it was permitted to put the furnace on the second time, it was obligated only to pay for the time it was in operation, or—I don't mean that exactly, I mean only for the period that it—until the suspension of it become effective, be-

cause there might be many days, or even periods, or weeks in that interval when it actually would not be in operation, but as long as they had the right to take, and hadn't surrendered the right to take, they had to pay, until the surrendered that right to take, and ceased to take it.

Now, if your Honor, please, the Ohio's position is this: In the first place, this first suspension is either under and excused by, Article XIX, because it was caused by the interference of the orders and regulations of a government agency, to-wit: the War Production Board; and if so, that suspension is eliminated so that for the purposes of the application of the other clauses of the contract, the taking of this second block was continuous from November 1941, until November 1945. Or, if it was not excused by reason of Article XIX on the action of the War Production Board, then it was excused by the special arrangement made with the City, where the City consented to the suspension because it was mutually [9] advantageous to both parties to suspend. And in either event, for the purposes of the application of the contract for the determination of the rates payable for the taking by Ohio, as I have said, been continuous from November 1941, until November 1945.

And then we came to the third question, which is the question on which we ask a declaratory judgment, which was involved in the other question or refund as well. The Ohio contends that under the true interpretation of this contract, any second taking of power for the second block—the 6,000

block, or load of power; that under the contract if they had once paid for a full year for that load, they take it again, they only have to pay for the time of the taking.

Your Honor will notice in this contract that it is a peculiar contract, as electrical contracts go. There is no rate or charge, generally speaking, for energy consumed. It's what's known, as a "demand contract." The first block of power is a demand of 6,500 kilowatts, and under that the Corporation pays each month 1/12th of \$17.50 times 6,500, irrespective of whether their furnace is in operation, or how many days or hours it's in operation, or how many kilowatts of power they use, they pay that based on that demand. Under the second block, as provided in the contract, [10] that, as Ohio interprets it, that when they first took on—on were permitted—when they first take on the second block of power, they pay for it for a full year at \$17.50 per kilowatt monthly, or a total of \$105,000.00, whether they use the power, or to what extent they use it during that period.

Then, if they suspend, under the contract, and not under their right under the contract, and not because of governmental interference, or not because of the special arrangement with the City, then they can only come back on and take that power if the City, in effect, in its judgment, absolute control judgment, elects to permit them to come back on the power, on—and their election—and the only thing concerning their election is the judgment of the City whether the City at that time

has surplus power; that is to say, power which the City's facilities are capable of generating, or are generating, for which the City has no sale for at the time. If the City determines that, then when the second block of power comes on, it is the Ohio's contention that under the terms of the contract properly construed, they pay for that power only so long as they take it; that is to say, at per month  $1/12$ th of \$17.50 times 6,000 kilowatts—times 6,000.

Now, our contention—when this case was [11] first instituted, and a Complaint was drawn and filed, it was assumed by me, perhaps erroneously, perhaps I should have known better, but I assumed that the suspension of taking of the second furnace had occurred thirty days after the notice of intention to suspend; and the amount of refund that was claimed in the Complaint was based on an assumption that the suspension occurred on or about September 21st. During the course of preparation for trial, and during these pre-trial conferences, the Ohio has—the situation has developed which I have stated, and Ohio has waived any claim for refund except after November 24th, and that reduces the claim for refund from the \$44,000.00 set forth in the Complaint, to the \$27,041.00 and some cents, set forth in the pre-trial order.

Now the matter of business compulsion, if your Honor, please, it's admitted that all payments for which in part refund is sought, were made under protest—written protest. The business compulsion angle is that Ohio has this escrow fund of some nearly \$100,000.00, the amount is not material, per-

haps but a substantial amount; that under the terms of the contract if Ohio defaulted in payment of any bill as rendered, the City might declare a default under the contract and forfeit the escrow fund, in addition to the fact that they might [12] suspend delivery of power, and shut down Ohio's operations, which—as I have said, and one furnace has been continuous since the plant was completed early in 1941.

Now, we expect under those facts, and they will be developed, to show that we are entitled to this refund, and that we are entitled to a declaratory judgment from this Court, to the effect that on any—that on the resumption of power, taking of the second block which has already occurred, that on any future resumption which the City in its discretion may permit, in its judgment, because it has surplus power, may permit, the Ohio is obligated to pay, as the contract says, only pay for the energy used. Well, that's a little bit of a misnomer, because as I have already said to your Honor, there is no provision in this contract anywhere establishing what is known as an "energy rate," but to pay for energy used, as the contract expressly says, must be to pay for the time that the energy for the second block is being taken, or by months, or otherwise.

If I haven't made a clear statement, and if there are any questions, I would be——

The Court: Is there any dispute at all concerning the 6,500 kws.?

Mr. Metzger: There is no dispute about that at all. [13]

The Court: Neither on the matter of payment, nor on the matter of——

Mr. Metzger: I think that's entirely correct. As far as—for the first block, 6,500 kilowatts of power, there is no dispute between us.

Mr. Boyle: I think not.

Mr. Carothers: Except as to the amount you actually demanded during that period on your one furnace. There is a dispute over the demand.

Mr. Metzger: Well, the City's position there, your Honor, they should state it themselves, rather than for me to state it, I think.

The Court: Well, I want to see how closely you are in accord, and what we can eliminate.

Mr. Metzger: The—the——

The Court: From your statement I take it that the first unit of 6,500 kw's, was a demand obligation.

Mr. Metzger: Yes, they're both demand obligations.

The Court: And even if at any time during—involved herein, you use less than 6,500, you still have the liability to pay for the 6,500.

Mr. Metzger: That's right. As far as the [14] 6,500 is concerned, your Honor, please, where that one furnace is concerned, I think there is no dispute at all. The question arises here: The City, I will state it now—the City contends that when we gave a notice on August 21, 1945, that we intended to suspend the operation of the second furnace, that that required us to suspend at the expiration of



thirty days from that date. The notice didn't say when we would suspend. The contract merely says that we must give at least thirty days' notice; we might give sixty days' notice; we might give a hundred days' notice. The notice didn't say what date we would actually suspend. As I have said to you, the suspension did occur, the second furnace was taken out of production, and off the line, around about the 4th of September. Then the controversy arose as to the obligations, of Ohio to pay, and the second furnace was put back on the line for two weeks. Following October 13th, it was completely suspended and hasn't been resumed.

Now, the City says because after thirty days from our notice, the second furnace was in operation, they say one of two things, as a result: Either that our notice of suspension became wholly abortive, and for the purposes of the contract, we are still taking the second block of power; or that if under our notice we did suspend on September 21st, that they have a clause [15] in the contract which is called a "ratchet clause," it's found under the paragraph of the contract dealing with billing demand; and they say that under that clause, if we only had one furnace on, we had to pay for the highest actual demand recorded, even though the second furnace wasn't there, and that a demand was recorded of not 12,500 kilowatts, but of 11,988 kilowatts.

The Court: And is it admitted that that 11,988 kilowatts was energy consumed by one furnace alone?



Mr. Metzger: No, oh, no. No, that demand we will show, originated and was incurred during this period of two weeks when, as I have said, in the last week in September and the first week in October, when the two furnaces were in operation and before, as we contend, the suspension of taking of the second block became operative.

Mr. Boyle: May it please the Court, I think the counsel has fairly well covered the issues; and just on one or two matters, I wish to make our position a little more clear. This contract first, according to our contention, is a contract for power on an annual rate on a firm power basis. The provisions of the contract, taken as a whole, provide, as to the 6,500 block of power, the initial block, that payment shall be made upon the basis of \$17.50 per kilowatt, whether the power [16] is used or not.

The Court: That's a kilowatt year, I presume?

Mr. Boyle: Yes. The contract further provides that the payments shall be made on a basis of the actual demand used in any period during the year, if it is in excess of the contract demand, or 6,500. On the second furnace, according to our contentions, the same prevails, with the exception that there is a provision in the contract that on discontinuance of the second furnace, following one year's consecutive operation thereof immediately preceding the discontinuance, then the charge for that furnace shall be prorated up to the time of discontinuance; and that the annual feature as to the additional load, is destroyed in case of the discontinuance.

That brings us down to the City's position on the

question of the notice given. As counsel has stated, notice was given to the City on the 21st of August, or by letter on that date, that there would be a discontinuance under Section, or Article X, of the contract.

Counsel has stated in Court, although the pleadings show the discontinuance on the 20th of September, he now states that the discontinuance actually occurred on September 4th; and that two or three weeks [17] later, service was resumed. Now, it's our position that if there was a discontinuance on September 4th, then—and service resumed, you have a destruction of the year's continuity, and even under that contention, the plaintiff was required to pay the contract rate for the full 12,500 load. If there was not a discontinuance at that time, or the events following, the correspondence between the parties will show that there was a waiver of the right of discontinuance. It's a waiver of this notice, if you please; so that, under that theory, no proper notice has been given of any discontinuance of the 6,000 block. If——

The Court: Let me ask you this question in reference to your pretrial stipulation. It appears that in October, November, and December of '45, the power actually consumed, I take it this demand—this language, demand power for those months was actually consumption power?

Mr. Boyle: No, your Honor, I don't believe that is correct. The consumption of the power, the amount consumed, has no bearing on the demand. Those figures show that during those three months,

that the highest actual demand at one time reached the figures that are set forth there.

The Court: For the operation of a single [18] furnace?

Mr. Boyle: That's the question. If the notice suspended the second furnace, then it's our position that, under the terms of the contract, they will be required, and are required, to pay for a period of eleven months under the initial block of power, a bill based on the highest demand that occurred during that eleven-month period. So that if—to illustrate it—if we take and arrive at the demand of 11,988 for—I believe that is the month of October—and their position is correct, our going under the contract for the single furnace would be based not on 6,000 demand, but on a demand of 11,988. Now, have I made myself clear?

The Court: Not entirely. Now, the first unit of this plant was assumed to require a maximum of 6,500 kilowatts.

Mr. Boyle: That's right.

The Court: And whether that was used or not, it was to be paid for on that basis; and the City was required to stand ready to serve to that extent.

Mr. Boyle: That's correct.

The Court: And throughout the time involved here, the payments were made on a basis of 6,500 kilowatts, on this first unit.

Mr. Boyle: I think that's correct with this [19] addition, that if at any time prior to the second furnace going on they exceeded the 6,500 demand—let us illustrate by saying their demand, actual de-

mand was 7,000—we were not required to stand ready to furnish an excess, but they were billed on that 7,000 for a full period of a year from the date of the—that the demand increased, so that the contract provisions, the firm power agreement, was on 6,500, but their bills were rendered not on the consumption of energy, but upon the highest demand that they took for a thirty-minute period during the terms of the contract, and that billing would be continuous for an eleven-month's period thereafter, so that if——

The Court: That is whatever their peak-load happened to be in excess of 6,500, that they thereafter became obligated to pay throughout the period of the year of whatever the peak-load was.

Mr. Boyle: That's correct. So that we contend here that even though the Court should find that proper notice was given, and there was in fact a suspension, that the billing, the amount of refund would be based upon the difference between 12,500 kilowatts, which we billed under our contention, and the highest demand that occurred during that eleven-month period, which I think will probably be shown as 11,988.

The Court: And now does the contract specifically [20] cover this provision that you——

Mr. Boyle: Yes, I think it does, I think counsel would probably admit that.

Mr. Metzger: I'll admit there is a ratchet clause in the contract, yes, your Honor, that's there. I do not admit and I want an opportunity to present to

the Court an objection to certain statements counsel has made as being not properly before—that position or assertion that he is now making is not within the issues of the pleadings as made. In other words, if your Honor please, counsel has stated here now for the first time that Ohio waived its notice of intended suspension of given or dated August 21, 1945. There is no plea to that effect, and the waiver, I think, has to be set forth and specifically pleaded.

The Court: The Court is not going to try this case on grounds that are technical at all, particularly when an interpretation of the contract is sought, and declaratory judgment is sought. If there's surprise, I would rather continue the case, and give you an opportunity to meet it——

Mr. Metzger: Well, we have all our witnesses here.

The Court: But the purpose of a pretrial conference and the pretrial order, is to eliminate those [21] very things and the pretrial order can frequently be more comprehensive than the pleadings are.

Mr. Metzger: That is true, but it is not embodied—and this is the first time I have heard anything about any waiver.

The Court: Except, Mr. Metzger, the amount of power consumed during November, October, November and December, and that's what led the Court to make the inquiry it did.

Mr. Metzger: If the pretrial order does state then we have no—if that is the fact, that the demands registered, the maximum thirty-minute de-

mands registered in those months, according to the City's contention, were so and so, we admit that the demands were in October as stated. We don't admit any demands—maximum demands, in excess of 6,500 after November.

The Court: Well, apparently from this pretrial order, it is admitted there is no contention that there was—that there was a consumption, I mean, rather than a demand—after November or December.

Mr. Metzger: Well, none of us are talking about consumption. We're all talking about demand. The whole contract deals with demand.

Mr. Boyle: Yes, I think that's true.

The Court: Well, it involves the other [22] element though, of what your maximum load was at some one time, and thus the demand grows out of the maximum load.

Mr. Metzger: Well, that's demand, your Honor. It's demand, that doesn't—I mean, for example, your Honor, please, to make it very simple, in your home, if you had a demand meter which no citizen—no residence does, but if you had your electric stove, and you had all your lights on, and you had the vacuum cleaner going, and every electrical appliance in the house all going at one time, that would draw so many kilowatts of power, and that would be the maximum demand, but you might only have those on, all simultaneously, for one minute only. Now, you wouldn't take kilowatt hours, because at that time you only had all these things on for a very few minutes, or seconds, even, altogether, but that would register a maximum demand.



The Court: I understand that, I think, Mr. Metzger.

Mr. Boyle: The Court asked for a reference to the—any place in the contract which supported the billing upon the highest actual demand during the period. The Article VII of the contract reads as follows: “The Billing Demand,” that’s the demand which we bill, “shall be the contract demand, or the actual thirty-minute [23] integrated demand, as determined in the following paragraph, whichever is higher, provided, however, that the billing demand for any month shall not be less than the highest actual demand, which occurred during the immediately preceding eleven months, except if specified to the contrary under Alteration or Cancellation of contract demand, and that is the feature that governs. Just one more matter with reference to the shut-down which occurred in, I believe it was April of 1944. Is that correct, Mr. Metzger?

The Reporter: That’s correct.

Mr. Boyle: That is the shut-down, which the City contends was agreed to by both parties, and a special arrangement made only to the extent that the plaintiff in this case would have the right to come back and resume its load upon the giving of 15 or 30 days’ notice. It is our contention that that arrangement in no way affected any other provision of the contract, but simply gave to the plaintiff assurance that the plaintiff would be able to pick up this load, at a time that either the City, or the plaintiff, desired.



The Court: Well, I am still a little confused as to how this shut-down by reason of War Production Board orders, becomes material here.

Mr. Metzger: Your Honor, please—— [24]

The Court: ——particularly in reference to whether—there is no refund sought for that period.

Mr. Metzger: No, your Honor, no. The Ohio—it has been said sort of in the vernacular—has three strings to its bow. If your Honor holds with us, that the proper interpretation of this contract is that on resumption of taking of the second load,—second block of power, which as I have said is solely in the City's discretion whether do it or not, if they have—if it deems it has surplus power, that then we only pay the demand charge for the number of months that we continue to use it. If your Honor eventually so holds, then frankly, the question of the previous suspension, whether it was for a cause beyond control, or whether it was under a special arrangement with the City, becomes wholly immaterial, because that ruling interpretation of the contract will cover the point.

Now, on the other hand, if by chance, or in your Honor's judgment, our interpretation should be incorrect, then the matter of either the suspension for a cause beyond control, or a suspension outside of the contract, by a special arrangement with the City, becomes—one or the other of them becomes material, for in either of those events, for the purposes of the contract, that period of suspension is excluded from consideration, [25] and the taking of the second block has been, for the pur-

poses of the contract, continuous from November, 1941, until whatever date the suspension occurred. And in that event, the clause of the contract is specific, that if we once start up the second furnace and we take it continuously for more than a year, the excess fractional part of a year over one year is to be paid for prorated, that is, to be paid for on a monthly basis; and that contention—that construction, will again sustain Ohio's claim for refund.

The Court: It's time now—do you have anything further that you want to say, Mr. Boyle?

Mr. Boyle: Unless I clear up further the matter that the Court asked about. I don't know whether I could be of assistance to the Court on that.

The Court: Is the City making a contention that the War Production Board orders were not effective insofar as this contract is involved?

Mr. Boyle: Yes, your Honor, we contend they did not affect the contract and they did not give cause to the right of the company to suspend under Article XIX. Under Article XIX there is no question but that the—if the cause was applicable that they could suspend, and the bills then would be prorated during the time of suspension, so that it does become important [26] to determine whether or not this was a cause mentioned in XIX.

The Court: Well, of course, I would have to be advised more fully as to what those orders were; generally speaking, I would be inclined to hold that the orders would be effective orders, they were emergency measures and war orders, and——

Mr. Boyle: I might clear up our position on that a little——

The Court: ——and they were beyond the control of anyone—any private corporation, or any municipal corporation, if they directly involved this situation.

Mr. Boyle: It's our position, your Honor, that the first orders of which counsel has spoken, do not limit the company in the production of this product; perhaps, limit it in the sale of the product; and the final order, upon which they are relying, is an order which simply provides that manufacturers of steel, not manufacturers of ferro chrome, which this company was manufacturing, should use a certain amount of scrap content in that manufacture. Now, it is our position that that did not interfere with their production, their product at all, it might have lessened their market for their product, but it interfered not at all with the production. [27]

The Court: I think we will suspend this case for the time being—I'm going to take the morning intermission shortly, but I have some ex parte matters involving the Lands Provision that I shall take up now, and then will call a recess.

Mr. Metzger: Well, we are excused now until Court reconvenes after recess?

The Court: Yes, at least twenty minutes.

(Recess.)

The Court: Now you may proceed, Mr. Metzger.

R. L. CUNNINGHAM

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name?

A. R. L. Cunningham.

Q. And where do you live, Mr. Cunningham?

A. Hartville, Ohio.

Q. Are you employed by—do you have a position with the Ohio Ferro-Alloys Company? [28]

A. Vice-president of the Ohio Ferro-Alloys Corporation.

Q. How long have you been with that company?

A. Since 1939.

Q. Since 1939. And how long have you been Vice-president? A. Since May, 1946.

Q. Prior to that time?

A. I was assistant to the vice-president from January 1, 1944, to the time of May, 1946.

Q. What's the nature of your duties during the period from '41 on, in a general way?

A. An executive, an official of the corporation.

Q. Do you have anything to do with the plant, or Tacoma operations?

A. I have been in charge of production since January, 1944, in complete charge of production.

Q. In complete charge of production?

A. And sales.

(Testimony of R. L. Cunningham.)

Q. And that includes the Tacoma plant?

A. It includes all points.

Q. All points. I take it then that you are familiar with the contract with the City of Tacoma, and the Ohio Ferro-Alloys Corporation, dated March 21, 1941?

A. Yes, I am.

Q. Did you have anything to do with giving the notice to the City, of suspension, or intended suspension of [29] operation with the second furnace, in 1945?

A. Yes, on August 21, 1945, I wrote a letter to the City advising them that we wished to suspend the taking of the second block of power, 6,000 kws. and——

Q. I am handing you a photostatic copy of a letter marked for identification, Plaintiff's Exhibit 1, and ask you if that is a copy of the letter that you referred to.

A. That is a copy of the letter referred to.

Mr. Metzger: We offer the same in evidence, if your Honor please, and counsel—we have an agreement between counsel that copies may be used in lieu of originals.

The Court: Very well, it will be admitted in evidence.

(Whereupon photostatic copy of letter referred to was received in evidence and marked Plaintiff's Exhibit #1.)

(Testimony of R. L. Cunningham.)

PLAINTIFF'S EXHIBIT No. 1

Copy

August 21, 1945.

Air Mail

City of Tacoma,  
Department of Public Utilities,  
Light Division  
Tacoma, Washington.

Attention: Mr. Verne Kent,  
Superintendent of Light Division

Gentlemen:

We wish to give the required 30 day notice that we wish to discontinue the use of the 6,000 kw. block of power for our #2 Furnace and that billing for power be reduced to cover the initial block of 6,500 Kilowatts.

We have some extensive repair work to be done on these furnaces and wish to take advantage of the present lull in business to accomplish that end. We still hope to operate two furnaces at Tacoma and will endeavor to give early notice for return of this second furnace power.

Yours very truly,

OHIO FERRO-ALLOYS  
CORPORATION.

R. L. CUNNINGHAM,  
Asst. to the President.

RLC:cm

jlm 12/4/45 3 copies

(Testimony of R. L. Cunningham.)

Q. Mr. Cunningham, this letter says, "we wish to give the required thirty-day notice that we wish to discontinue the use of the 6,000 kw. block of power for our second furnace." Had you at that time determined on any specific date for the shut-down? A. No, we had not.

Q. Of that second furnace? And the letter did not specify? [30]

A. The letter did not specify the suspension date.

Q. The suspension date. Now following that letter, did you have any oral communication with any City official?

A. Yes, on August 24, 1945, I called Mr. Darland, who was then City Light Superintendent by long-distance telephone, from Canton, to his office here in Tacoma, in reference to the arrangements of the suspension; and while talking to him, he made the statement that the City was not clear as to whether the twelve consecutive months mentioned in the contract, referred to the original or initial twelve consecutive months, or whether they were to be applied against this second taking of power starting February 26, 1945.

Q. Well, now, just a minute right there, Mr. Cunningham. Do you have a copy of the contract of March 21, 1941, with you?

A. I don't have it in my pocket.

Q. Just for the convenience or enlightenment of the Court, you say that Mr. Darland told you that the City wasn't sure whether the 12-months' period



(Testimony of R. L. Cunningham.)

applied only to the initial taking, or to a second taking of the second block of power, is that right?

A. That's right.

Q. Will you just point out to the Court what paragraphs of the contract refer to this 12-months' taking? [31]

A. Section 10-A, Paragraph starting—the last paragraph in 10-A: "If and when the Corporation should drop its additional 6,000 kilowatt requirements, either temporarily or permanently, and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load, the 'ratchet' clause specified under 'Billing Demand' will be dropped proportionately."

Q. All right. Well, now, Mr. Cunningham, at that time had the Ohio Ferro-Alloys made at least twelve consecutive monthly payments for the 6,000 kw. load?

A. Yes. they had made approximately 27 months' payments. Continuous——

Q. For the period from what?

A. From November '41 until April '44.

Q. April '44. And you say Mr. Darland told you the City was uncertain whether that twelve-months' clause applied to—had been satisfied, in other words, or whether it had not, is that right?

A. That's true. He could not make any decision over the telephone. He said he would have to check with the City attorney to determine what their stand would be.

(Testimony of R. L. Cunningham.)

Q. All right. Following that, what happened with respect both to any further correspondence with the City, of communications from the City, in respect to the actual use or operation of the second furnace? [32]

A. Well, August 27th, I received a wire from Mr. Darland, stating that it was their contention that these twelve consecutive months mentioned in the contract would be applicable to the second taking, or to the effect that we would have to pay from February 1945, for twelve months, or ending February 1946; and that the billing—

Q. Without going too much into detail, into the contents of that letter, he and the City announced the position. Did you acquiesce in that position?

A. We did not. We countered that with a wire immediately stating that we did not concede to that interpretation, and we then, during the month of September and October, there was an exchange of correspondence between the City and ourselves, relating to each other, or we related to them our position, and they in turn theirs.

Q. All right. Well, what was the situation at that time with respect—this is now all following your letter, Plaintiff's Exhibit I, what was the situation with respect to the use or operation of the second furnace?

A. Well, we suspended the operation of the second furnace on September, the 4th, and—

Q. That was prior to your—that was within less than thirty days from the date of your letter?

(Testimony of R. L. Cunningham.)

A. That's right. And the furnace was still under suspension on September 21st. It was our thought that if the City [33] was to follow our interpretation of the contract, that their meter men would be at the plant on September 21; and we set the demand here back to one-furnace operation, which they had previously done on the first suspension—or the first drop in the power on April 26, '44. No meter man appeared, and nobody appeared the next day, so we used the second furnace for a period of two weeks, and on—I think that was October the 8th, it was then taken out of production, and that block was never used for production purposes since.

Q. At the time then that you took it out of production, this correspondence by letter and telegram to the City regarding the construction of the contract was still going on.

A. Was still going on. On October 15th, we finally received a letter stating—from Mr. Darland, to the effect that we need not write any further, that there was——

Q. Do you have that letter with you?

A. I do.

Q. Will you produce it, please?

Mr. Metzger: We offer that letter in evidence, as Plaintiff's Exhibit 2.

The Court: It will be admitted in evidence.

(Whereupon letter referred to was received in evidence and marked Plaintiff's Exhibit No. 2.) [34]

(Testimony of R. L. Cunningham.)

PLAINTIFF'S EXHIBIT No. 2

[Letterhead City of Tacoma]

October 13, 1945

Air Mail

Registered Return

Receipt Requested

Mr. R. L. Cunningham, Asst. to the President  
Ohio Ferro-Alloys Corporation  
Canton, Ohio

Dear Mr. Cunningham:

We acknowledge the receipt of your letter of September 25, 1945, regarding the interpretation of various sections of our power contract as affecting the requested reduction in load at your Tacoma plant.

In reply thereto, we reaffirm our previous position that the annual kilowatt year rate applies, unprorated, in this case, until the Corporation shall have paid at least twelve consecutive monthly payments based on a contract demand of 12,500 kilowatts effective February 26, 1945; this position being based upon the fact that Article 19 of the Contract was not applicable to the April 26, 1944 to February 26, 1945 shut-down of the second furnace. As stated in our former letter the position of each of the parties with respect to the applicability of Article 19 was expressly reserved. This understanding is supported by the correspondence,

(Testimony of R. L. Cunningham.)

and I have been informed, was agreed to by your Mr. R. C. Cole of the Tacoma plant who represented the Company in the negotiations at the time.

We feel that little more can be accomplished by a further exchange of correspondence other than to reiterate our previous position. However, if you desire to have your representatives confer with us, we will be glad to meet with them.

Very truly yours,

/s/ A. F. DARLAND,

Superintendent of  
Light Division.

AFD:jw

[Endorsed]: Filed Sept. 5, 1947.

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Q. Mr. Cunningham, you say that following October 8th, the operation of the second furnace has been wholly suspended?      A. That's true.

Q. And continuously since that time?

A. That is true.

Q. Now, at any time after that date, was there current employed—electric current used simultaneously in both of your furnaces?

A. Yes. In November there was power used to warm up the one furnace and interchanging from one product to the other, and this power was not used for production purposes; it was used to warm up the furnace; and on November 24th, from that

(Testimony of R. L. Cunningham.)

date on, no energy has been used, based on our recording demand meters, and limiters, and other apparatus, in excess of the 6,500 kw's specified within the first block of power.

Q. Well, Mr. Cunningham, you just now mentioned something about your demand meters and demand limiters. What devices does the company have to show the quantity of power that is being taken? In other words, to regulate or indicate the demand imposed upon the City's facilities?

A. Well, we first have a Westinghouse recording demand meter, which has an ink hand that records the energy as used in a cycle each half hour. This meter then [35] records the high demand reached in each half hour, continuously, from the time it is put into operation. There was no such demand shown on our chart, in excess of the 6,500 kw's since November; besides that——

Q. Does that chart—does that chart run every day?

A. It runs continuously from the time it's installed until the plant shuts down.

Q. That meter was installed and in operation——

A. It was installed in——

Q. ——in September of 1945?

A. That is true.

Q. And prior thereto, I take it.

A. That's true.

Q. And it has been continuously in good operating condition, and in operation since that time?

A. That is true.



(Testimony of R. L. Cunningham.)

Q. Do you have, in the line of your duty, have you examined the charts made by that meter?

A. I have.

Q. And there has been no recorded demand in excess of 6,500 kw's since November 24th, 1945? Is that correct?      A. Absolutely.

Q. Now what other devices does your corporation have?

A. We have a demand limiter, a General Electric demand limiter, which is set to kick off the plant load, or the [36] furnace, when it reaches a setting which we have set for 6,384 kw's; in other words, when our peak load gets up to 6,384, or in excess of that, it kicks the furnace off and the power is dropped and remains off until the half hour in question is reached; and it resets and the furnace then can be put back on the line. That also has been in operation since the plant was built, and was in good working order during this disputed time.

Q. Now, with that demand limiter in operation and in good working order, and set at 6,384, would it be possible for Ohio Ferro-Alloys Corporation to impose a demand upon the City's electric facilities in excess of 6,500 kw's?

A. No, it would not. It would kick the power off before it reaches 6,500.

Q. Was that limiter in good working order during all of that period?

A. Yes, it was. I think it was inspected by the



(Testimony of R. L. Cunningham.)

General Electric Company just a few days prior to the end of the year, the end of 1945, and it was regularly inspected.

Q. I hand you what has been marked for identification Plaintiff's Exhibit 3, and ask you what that is?

A. Well, its a chart that has been used on our Westinghouse demand meter.

Q. That's a section of a — [37]

A. Section of a tape—

Q. —of a tape, on which that demand meter records the 30-minute demands imposed by your taking, is that correct? A. That is true.

Q. And, as you have said, that meter has made a chart like that, a permanent record, continuously since—prior to September 21, 1945?

A. That is true.

Q. Now, Mr. Cunningham, following September, 1945, and up to and including the month of February, 1946, how did the City bill the Ohio for energy?

A. The City billed on the basis of 12,500 kilowatt demand.

Q. That was—how did they make up that?

A. Well, it was the initial 6,500 kw. block plus the second additional block of 6,000, or a total of 12,500.

Q. Did you—what did you do about those bills?

A. We protested in writing the October bill through February 26th; and the reason we did that was because of our thought of the City claiming a

(Testimony of R. L. Cunningham.)

breach of contract that would affect the first block of power, and a forfeiting of our \$90,000.00 in escrow fund.

Q. The escrow fund was provided for in what article of the contract? Do you recall?

A. I don't recall.

Q. It's in the contract. [38]

A. It's in the contract.

Q. And at that time Ohio had paid into the City—did you say \$90,000.00?

A. Ninety some thousand dollars.

Mr. Metzger: Your Honor please, it is admitted and set forth as such in the pretrial order, and by the pleadings that these payments were made under protest.

Q. Now, Mr. Cunningham, if it hadn't been for this escrow fund and the danger of a possible attempt to forfeit that, would you or would you not have withheld payment of these bills?

A. Well, we would have withheld payment, because we were not using the power.

Q. I think, Mr. Cunningham, in connection with the bill of February—February 1945, in addition to your protest of the payment generally that the same as you had been protesting it before, you specifically protested, and in any event, that even under the City's construction of the demand, it should be reduced as of February 26th, did you not?

A. That was 1946.

Q. 1946.

(Testimony of R. L. Cunningham.)

A. Yes, we received a bill for the 12,500 kilowatt charge, for the month of February, 1946, in its entirety. I [39] wrote the City with reference to this, stating that under their contention, they should have only billed us until February 26th. They conceded in that, and gave us credit on the following bill, for the two days' overcharge.

Q. In other words, the City at that time, by its action, admitted that—

Mr. Boyle: Just a moment there—I object, as calling for a conclusion.

Mr. Metzger: All right. I withdraw that question.

Q. The City on your contention, dropped its billing to a contract demand of 6,500 kw. on and as of February 26th, 1946?

A. They conceded and dropped the billing to 6,500 on February 26th.

Mr. Metzger: Your Honor please, the City's demand for production or for admission of the genuineness of certain documents, contains this protest the witness has been testifying to. I do not have any copy of it. I would like to—except as it was furnished with their demand.

Q. Handing you now paper marked for identification Plaintiff's Exhibit 4, ask you if those two letters, one dated March 7th, from you to the City and one dated March 13th, I think, from the City to Ohio, are the letters you [40] referred to regarding this protest of the February bill and the City's reaction thereto.

A. They are.

(Testimony of R. L. Cunningham.)

Mr. Metzger: We offer the same in evidence.

Mr. Boyle: No objection.

The Court: It will be admitted.

(Whereupon document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. Mr. Cunningham, what is the amount that Ohio has overpaid for the period subsequent to your notice of intended suspension to and including the bill rendered for February, 1946?

A. You mean what date? Starting what date?

Q. Well, what is the amount for which the City—the Plaintiff, the Ohio Ferro-Alloys Corporation is claiming a refund?

A. We claimed a refund of \$44,000.00.

Q. Originally? A. Originally.

Q. Now what are you claiming?

A. We are claiming \$27,000.00, conceding the demands set in October and November were a very small part of the demand that we could have used—or the energy we could have used. We are assuming and paying for that, or [41] deducting from our original claim, some \$18,000.00.

Q. Mr. Cunningham, as a matter of fact, in November how long a period was there any energy being used for two furnaces simultaneously?

A. I think it was three days.

Q. In November?

A. November. Three days.

Q. Three days. A. Parts of three days.

(Testimony of R. L. Cunningham.)

Q. Parts of three days.

A. Parts of three days.

Q. And in October? A. Seven days.

Q. Seven days? A. Seven.

Q. And you were paying a bill under which you could have used both furnaces simultaneously for thirty-one—thirty or thirty-one days?

A. On the basis of energy used, we could have used better than four million kilowatts per month on a furnace; in this case, we used a couple of hundred thousand kilowatts, a very small portion.

Q. And you say you are claiming—your claim for refund was \$27,000.00. Actually it was set forth in the pretrial order as \$27,041.00 and a few cents?

A. That is true. [42]

Q. And ten cents, is that right?

A. That is true.

Mr. Metzger: That is all, cross examine.

#### Cross Examination

By Mr. Carothers:

Q. You have never been in charge of the Tacoma Plant at any time, have you? A. Yes, I have.

Q. When—what period were you in charge?

A. In what way do you mean?

Q. Well, I mean here on the ground? Have you—

A. At various intervals, I have been in charge on the side.

Q. But you at all times had a local manager, is that true? A. That is true.

(Testimony of R. L. Cunningham.)

Q. And on frequent occasions you visited the Tacoma plant, is that right? A. That is true.

Q. So that when you stated a few minutes ago that these devices limit and measure the energy used were in good shape, you were just taking somebody else's word for it, is that it?

A. Well, I have observed them when I was here; I have observed the charts which they have recorded, and which [43] came into the Canton office monthly.

Q. But you have no knowledge yourself as to the condition of those devices?

A. I don't think anyone would, except an expert.

Q. You gave the City no notice—the fact that you closed down your furnace on the 4th of September, 1945——

A. I gave them no notice. I asked—I talked to Mr. Darland about a 15-day notice, and he immediately went into the question of whether the——

Q. Well, on August 21, 1945, you transmitted your notice that you were giving the required 30-day notice, is that right? A. That is correct.

Q. And twelve days later, you shut down before the thirty days could possibly come about, is that right?

A. That's true, we had the privilege.

Q. And so, you were shut down on the 24th—on the 22nd of September, at midnight.

A. The 21st, also.

(Testimony of R. L. Cunningham.)

Q. Yes. In your complaint you allege you shut down on the—at midnight on the 22nd of September.

A. Well, we were shut down prior to that, and afterwards.

Q. Well, now when did you—after the 22nd of September did you resume operation of the furnace? A. The 24th. [44]

Q. The 24th of September?

A. That is right.

Q. And you ran how many days?

A. Until the 7th of October.

Q. And you ran including—did you open on the 24th?

A. We started partial production on the 24th.

Q. So you had seven days in—

A. We did not have production, we warmed the furnace up for about five days.

Q. Seven days in September and seven more days in October, you operated.

A. We warmed the furnace up for the first time.

Q. Well—

A. We didn't have production.

Q. Then you shut down on the 7th.

A. That is true.

Q. Did you give the City any notice that you were shutting down on the 7th of October?

A. They already had notice that we were going to shut down on the 21st.

Q. Yes.



(Testimony of R. L. Cunningham.)

A. We had the furnace off on the—at the end of the thirty-day period——

Q. That's right.

A. ——we were still in litigation with the City on October, [45] the 7th yet, and as late as October 15th.

Q. You just answer my question. After September 22, 1945, you gave the City no notice whatever of your intention to resume operation of the second furnace, did you?

A. We gave the required 30-day notice.

Q. On August 21——

A. That's right

Q. Which means that you were shutting down on the 21st of September, is that right?

A. Not necessarily.

Q. Well you were down, were you not, on the 21st of September?

A. We were down on September, the 4th.

Q. And you stayed down until the 24th of September?      A. That is true.

Q. From that point on, you did not notify the City you were going to open up and operate, did you?      A. They never recognized——

Q. Now, just answer my question. Did you give any written notice?

A. No, we did not give any.

Q. Now, then in November you opened up and operated for three days, did you not?

A. We didn't operate——

Q. Well, you operated two furnaces at one time, you had the [46] power on for both of them,

(Testimony of R. L. Cunningham.)

and ran the demand up to some 10,000, did you not?

A. On the basis of warming up the furnace.

Q. Just answer my question—did you run the demand up to 10,000 or over?

A. We run——

Q. That means you were operating both furnaces at one time, whether you were producing or not, doesn't it?

A. The power was on the furnace.

Q. Okeh. Did you give the City any notice whatever for that?

A. No, we did not.

Q. Why not?

A. We are only claiming a refund from November 24th.

Q. Is that so, well, how do you happen to—Who is Mr. Pritz, president of your Company?

A. Which Mr. Pritz are you talking about?

Q. L. G. Pritz?

A. L. G. Pritz.

Q. Yes.

A. He is president of the company.

Q. How do you explain the fact that on November 6, 1945, Mr. Pritz, as President of your Company, in remitting—in making remittance for the energy consumed in October, made the first protest that you were only operating one furnace and that you should only pay on the one furnace? [47] In other words, when you remitted the \$18,247.26, you did so under protest when they were covering the October bill. How do you explain it?

A. Well, I think it's self-explanatory. It states that we are paying under protest.

(Testimony of R. L. Cunningham.)

Q. Well, if you operated your furnace—those furnaces in October—what is the basis for making that claim, in this November 7th letter?

A. I think I recited that before; it was based on the fact that we did not wish to have a chance of the contract being breached, and the forfeiting of the \$90,000.00 covering—called for in the contract.

Q. Handing you Defendant's Exhibit A-1, purporting to be a copy of the November 6, 1945, letter, that I have just referred to in my last question, do you recognize that?      A. I do.

Q. That is a copy of—

A. It appears to be.

The Court: You had better have it marked, or pass it to the Bailiff.

Q. Handing you Defendant's identification A-2, which purports to be a copy of a letter that Mr. Pritz, your president transmitted to the City of Tacoma, on December 7th, wherein remittances for November—the November bill was made and containing the same protest of payment as the [48] November letter did. Do you recognize that as a copy of the letter?      A. It appears to be.

Mr. Carothers: We offer it.

The Court: Any objection?

Mr. Metzger: No objection.

The Court: It may be admitted in evidence.

(Whereupon letter referred to was received in evidence and marked Defendant's Exhibit No. A-2.)

(Testimony of R. L. Cunningham.)

DEFENDANT'S EXHIBIT A-2

December 7, 1945

Airmail

City of Tacoma,  
Department of Public Utilities,  
Light Division,  
Tacoma, Washington.

Gentlemen:

You will please take notice that in payment to you this date of the sum of \$18,247.26, being the amount charged for electric current furnished during the month of November, 1945, against the undersigned The Ohio Ferro-Alloys Corporation, under a certain power contract between said Company and the City of Tacoma is not paid voluntarily.

From the information which we have it appears to us that the charge made against our Company is not in accordance with the terms of the contract, but inasmuch as the City declines to proceed with the furnishing of power under the contract unless our Company accepts the City's interpretation of the contract, we have no option but to make payment under protest and with the distinct avow that the whole amount is not due to the City.

Very truly yours,

THE OHIO-FERRO ALLOYS  
CORPORATION,

/s/ L. G. PRITZ,

LGP

President.

JLM

[Endorsed]: Filed Sept. 5, 1947.

(Testimony of R. L. Cunningham.)

The Court: It is now time for the noon intermission. I think we will suspend until 1:45 this afternoon.

(Recess.) [49]

The Court: You may proceed.

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### R. L. CUNNINGHAM

resumed the stand for further examination, and testified as follows:

#### Cross Examination

By Mr. Carothers:

Q. Mr. Cunningham, on the 27th of August, 1945, which was six days after you had notified the City by letter of your intended shut-down, the City advised you by wire that—of our interpretation of the contract, which would be required to operate for a twelve months' period, that is as to second furnace, or you would pay for it whether you operated or not. Is that true, on the 27th?

A. Something to that effect.

Q. And on the 13th of—on September 14th, 1945, you were advised by letter to that same effect, were you?

A. Prior to that there were other wires involved.

Q. Yes. On September 14th, you were advised that the City adhered to its position taken in its August 27th letter.

(Testimony of R. L. Cunningham.)

Mr. Metzger: If your Honor please, if an issue is to be made of this, I'll object to it because the letter is the best evidence and should be offered.

Q. Did you receive a letter dated the 14th of September, 1945, from Mr. Darland? [50]

A. I can't enumerate the many letters. There were many letters and there were various statements we had in our file.

Q. Well, I believe you testified on direct examination that such a letter was received by you—did you not?

A. October 15th was the letter I mentioned. We received it October 15th. I think it was written on the 13th.

Q. And that October 15th letter was to the same effect, was it not?

Mr. Metzger: The letter speaks for itself.

A. The letter says, at the bottom of the letter "No further correspondence need be handled with the city, because they would not go along.

Q. Now, you say that the City—that you only paid the City \$27,000.00, is that correct?

A. We are claiming that refund.

Q. Yes, and for what period is that claim made?

A. November 24th to February 26th, '46.

Q. Well, did you notify the city on November 24th, 1945, that you were shutting down the second furnace?

A. We notified the City on August 21st.

Q. So on the 24th, without any notice, other

(Testimony of R. L. Cunningham.)

than the August 21 letter, you shut down? The 24th of November you shut down the second furnace.

A. It had already been shut down before that.

Q. Well but you operated three days. You had the furnace on for three days.

A. 36 hours, to be exact.

Q. Well didn't you testify——

A. Parts of three days I said.

Q. Well how did you expect the City to know that you should only pay from the 24th of November, in the absence of any notice from you, as to the date when you shut down?

A. The City had a notice on August 21st.

Q. That you were going to shut down when?

A. It was assumed that it would be shut down in 30 days, or on September 21st, but at that time we had the furnace down and the City did not appear to change the meter, or did they on the 22nd or on the 23rd of September.

Q. Well you had been notified we would not change it, had you not?

A. Not until October the 13th, where we was sure there would not be a meeting of the minds.

Q. Mr. Cunningham do you have in your file the original letter of—written by Mr. A. F. Darland, Superintendent of the Light Division, City of Tacoma, under date of September 14th, 1945, addressed to your company?

A. I think we have the letter. I wouldn't state as to the date. We have the file.



(Testimony of R. L. Cunningham.)

Q. Well are you in a position to produce that letter? [52]

A. I think counsel is.

Mr. Metzger: September 14th, '45. That is a copy. The original is not in the file.

The Court: You say the original has been introduced?

Mr. Metzger: No, I say the original is in the Company's file. I am substituting a copy and making no objection to the use of a copy in lieu of the original.

The Court: Yes.

Q. Handing you Defendant's Exhibit—identification A-3, and ask you: do you recognize that identification as a copy of the original letter?

A. It appears——

Q. Of September 14th from Mr. Darland—September 14th, 1945, from Mr. Darland, Superintendent of Light to your company?

A. It appears so.

Q. And in that letter, the first paragraph, the Company was advised that the City adhered to its former position, is that——

A. That is true.

Q. So that when you shut down on the 24th of November, you didn't consider it necessary to notify the City at all that you were shutting down?

A. Well I said repeatedly that we gave notice on August 21st [53] and this—beyond this date of September 14th there was still more correspondence between the parties. You made a statement

(Testimony of R. L. Cunningham.)

in this letter that you adhered to your position, as well the Company also had later letters in which they adhered to their position.

Q. But you had proceeded to act and shut down, had you not?

A. I think we had the privilege of shutting down. Are you talking about September, or when?

Q. After September 22nd, you proceeded to exercise what you thought was your right to shut down, did you not?

Q. Well, it was an interruption.

Q. Yes.

A. We have a right to interrupt our—the initial notice was based—if you read the notice it was based on a possibility of repair work, and we have the right, naturally under any operation, to interrupt our regular taking of power.

Q. I don't quite—will you explain?

A. You say shut down. I say it was an interruption in the taking of power up to——

The Court: Oh, I think the Court understands pretty fully that the plaintiff here was relying upon compliance with the 30-day notice by reason of his letter in August.

Q. You are aware of the fact that the City bases its billings [54] on a calendar month basis, that the meter—it is customary to read your meter on the last day of each month. Are you aware of that fact? A. I am aware of that fact, yes, sir.

Q. Well, then, being aware of that fact, why did you not notify the City on the 24th of November to come and read the meter?

(Testimony of R. L. Cunningham.)

A. Well, I contend that the City——

Q. Now just—— A. Well, all right.

Q. Why didn't you—why didn't you consider it necessary to notify——

A. September 21st was the day that the City should have reset the meter.

Q. Well they advised you that the would not reset it, isn't that true?

A. Well they did not reset it.

Q. Well then did you expect from that time on for the city to send a meter man over every day to find out whether or not you would shut down, or not? A. It wouldn't be necessary.

Q. Well how would they know?

A. They knew on September 21st.

Q. They expected you to be shut down then, didn't they? A. We were shut down. [55]

Q. Now this morning——

The Court: Did you offer in evidence the copy?

Mr. Carothers: Oh, yes, I wanted to offer in evidence the Plaintiff's—or Defendant's identification.

The Court: Any objection?

Mr. Metzger: No, your Honor.

The Court: It will be admitted in evidence.

(Whereupon a copy of letter referred to was then received in evidence and marked Defendant's Exhibit A-3.)

(Testimony of R. L. Cunningham.)

DEFENDANT'S EXHIBIT A-3

September 14, 1945

Ohio Ferro-Alloys Corporation

Canton, Ohio

Attention: Mr. R. L. Cunningham,  
Assistant to the President

Gentlemen:

Receipt is acknowledged of your letter of August 30, 1945, in regard to the interpretation of contract for power for your Tacoma plant. After careful consideration of the same we have concluded that we must adhere to our position as set forth in our wire of August 27.

We believe that you have based your interpretation of the contract upon incorrect assumptions. The first assumption you discuss is not applicable for the reason that you did not in fact relieve the City of its firm power obligation when you shut down on April 26, 1944, since it was agreed in the correspondence with your Company and negotiations with your local representative that your rights for firm power would be preserved and that you might resume upon the giving of fifteen days notice. You were then contending, as you now are, under your second assumption, that Section 19 of the contract was applicable. This was not agreed to by the City. It is our understanding that your primary object in the negotiations was to preserve the firm contract for the additional load. In the final

(Testimony of R. L. Cunningham.)

adjustment each party reserved its position upon the applicability of Section 19.

The second assumption upon which your interpretation is founded is in our opinion also incorrect, in that you proceed upon the theory that Section 19 of the contract is applicable to the shutdown in question. To this we have never agreed. We think it plainly appears that your desire to be temporarily relieved of the additional load was due to the depressed market conditions for ferro chromium brought about by increased competition from high chrome content scrap.

Briefly, our position is as follows: Section 19 of the contract was not applicable. The shutdown occurred under the provisions of Section 10 of the contract, modified by the agreement to preserve your right to pick up the additional load.

The arrangement entered into amounted to no more than a commitment in advance on the part of the City that it would agree that the City would again deliver power for the second furnace on a firm power basis as provided in Section 10, and furnish the same upon 15 days notice. The contract and rate incorporated therein is fundamentally on a kilowatt-year basis with provision, however, for prorating for the second furnace load only "immediately following a full years billing at the specified rate." (See contract Section 4-b-3). Also see Section 10, where provision is made for dropping this additional load and where it is stated "if and when the corporation should drop its additional

(Testimony of R. L. Cunningham.)

6000 kilowatt requirements, either temporarily or permanently, and shall have made at least 12 consecutive monthly payments at the specified rate for this load the ratchet clause specified under 'billing demand' will be dropped proportionately." Manifestly the words "this load" refer to the additional 6000 kilowatts and the words "specified rate" refer to the rate for "this load," which is set up in Section 4 (b-3) where the \$17.50 rate is provided as absolute "except that the continuous and uninterrupted part year operations immediately following a full years billing at the specified rate shall be prorated."

There has not been a full years billing for this load since resumption of the same on February 26, 1945.

As heretofore stated, the contract rates were computed upon a firm kilowatt year basis; it was for this reason that the provisions were inserted in the contract permitting a prorating of the continuous and uninterrupted part year operation of the second furnace only when the same followed a full years billing at the specified rate. The City was purchasing power and selling to you at a loss when it agreed to permit resumption of service to your second unit. It anticipated a change in that condition upon the completion of its Nisqually project and had a right to and did rely upon a full years billing for this unit from the date of resumption of service. For the reasons herein stated, we cannot concede that you now have, either from a legal



(Testimony of R. L. Cunningham.)

or equitable standpoint, the right to escape the obligation of paying for the same as provided in the contract.

Very truly yours,

A. F. DARLAND

Superintendent of Light Division

AFD:jw

CC Mr. Jones

Corporation Counsel

[Endorsed]: Filed Sept. 5, 1947.

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Q. Mr. Cunningham, when you were being questioned this morning regarding the Plaintiff's identification—what is that identification——

Mr. Metzger: I think it is A-4——

The Witness: A-3.

Mr. Metzger: 3.

Q. (Continuing): ——Plaintiff's identification 3, which is a graph which was taken from a recording meter, we assumed—Defendant's counsel assumed that that was a graph for the entire month of December. What period does that graph cover?

A. 6:00 a.m. on the 31st of December, and January 2nd, 4:00 a.m., '46.

Q. In other words, that record you have in your hand only [56] covers only covers one day of December, is that true? A. That is true.

Q. And you testified that during the month of December, that the demand did not exceed 6500.

A. That is true.



(Testimony of R. L. Cunningham.)

Q. From what record did you——

A. Well this—from what record? I mentioned we have three different records.

Q. Well now, you didn't—you weren't testifying from that particular record, because that only covered one day, isn't that true?

A. This particular chart is a record of the—I imagine you are talking about a disputed meter reading?

Q. We are just talking about what you say your record shows.

A. Well I still say our record shows there was no demand charged in excess of 6500 kw's in December. The source of my information——

Q. Well, you weren't testifying from the record that you produced here, were you?

A. I didn't produce this.

Q. Well you——

A. This is a record and it covers those days I mentioned to you. As to the balance of it, which would be at great length—it might be a rod long, is not—I don't have it here, no. [57]

Q. Did you examine it?

A. Yes, I examined it.

Q. Well, was it separate from that sheet?

A. Well it is now.

Q. Well, will you explain why it is separated from the rest of the record?

A. Because this portion of the chart covers the disputed time. The City's meter and our meter differed.

(Testimony of R. L. Cunningham.)

Q. Well, Mr. Cunningham, that is a daily record is it not? A. It is a continuous record.

Q. Well, but that—that particular one that you produced covers the last day of December, did it not?

A. This was merely torn off from the rest of it.

Q. All right, answer my question. It only covers one day in December, does it not?

A. It covers 6:00 a.m. December 31st, January 2nd, 4:00 a.m.

Q. So it covers one day in December?

A. Yes.

Q. The other 30 days in December are not shown on that record, is that true?

A. That could not be. It couldn't be. It isn't physically possible to get them all on here.

Q. How long a time have you—has the company been keeping in operation such a recording meter?

A. As I recall, it was put in around June of 1945, this particular meter that puts out this chart.

Q. You have kept those records, have you?

A. Absolutely.

Q. There is no reason why you could not produce them here if necessary?

A. I don't think—I don't think counsel has them in his brief case. They would be voluminous.

Q. Well, I didn't mean that, but they are here in the local office, and you could make them available?

A. They could be produced in a reasonable time, yes.

(Testimony of R. L. Cunningham.)

The Court: Anything further?

Q. Mr. Cunningham, in computing the \$27,000.00 that you claim as a refund, what demand was that computed on?

A. Oh, you mean on how it was calculated?

Q. Yes.

A. Well, it is based on six days in November, 31 in December, 31 in January, 26 in February. It becomes 94—94 days. It becomes 94/365ths of a hundred and five thousand I think is the way it is calculated. A hundred and five thousand is based on 6,000 times seventeen fifty, which is the way the City have always billed for portions of months, which they did for February 26th, 1946. That is the way they calculated the refund of the two days that they gave us credit for. And it was also practiced in the [59] first shutdown, April 26th, 1944.

Q. From that time—during that entire period, as to the second furnace the charge was suspended—as to the second furnace, isn't that true?

A. I don't follow just what—

Q. Well there was no charge for the second furnace for that entire period of suspension in 1944.

A. There was a special arrangement outside of the contract.

Q. The demand was simply dropped down to 6500, isn't that true?

A. The City meter man came down on April 26th, 1944 and reset the meter.

Q. As I—then if you are figuring part month from November 24 on, why didn't you figure out the days in October that you didn't operate?

(Testimony of R. L. Cunningham.)

A. As I said before, we conceded the City \$18,000.00 for something that we didn't use, already.

Q. Well then you—you are conceding that you operated until the 24th of November, is that right?

A. I don't concede we operated. I concede there was a demand set by an operation of warming up period around November 24th which created a demand. From that date on there was no demand in excess of 6500. I still concede or say that on October and in November we used a very small portion of the power that we could have used under—or [60] did use.

Q. Well then, under the terms of the contract——

A. We operated——

Q. You were obligated—you recognize you were obligated to pay for that?

A. We operated 36 hours in November, and paid about \$9,200.00 for it.

Q. Well, under the contract you recognize that that——

A. Well, that—that is assumed and I don't think there is any argument about the fact that we gave the City \$18,000.00.

Mr. Carothers: That is all.

#### Redirect Examination

By Mr. Metzger:

Q. Mr. Cunningham, there are one or two matters that seem perhaps to be a little confused. For example, when you first started up the second furnace along in November of 1941, and from that

(Testimony of R. L. Cunningham.)

period on until April of 1944, you say that you continuously took that second block of power and you paid, as I understand it, each month one twelfth of seventeen fifty times six thousand dollars.

A. Yes.

Q. Now during that period what was the fact; was this second furnace in continuous daily operation during all of that [61] time?

A. No, it had to be down for repairs, change-overs—probably down as long as two weeks at a time.

Q. All right. Now during all that time, you were taking the power under the second block you were paying for it whether you made any use of it or not, it was the Company's, the Ohio's risk, is that right?

A. That is true.

Q. And the same situation applies here after August 31st, 1945?

A. That is true.

Q. Up to the time you had finally discontinued the taking of that power?

A. That is true.

Q. Whether you actually used it or not, you are now assuming and conceding to the Court, it was at the corporation's risk?

A. That is true.

Q. Now, Mr. Cunningham, I asked you on your direct examination something about this demand limiter. How does that demand limiter operate? Does it operate with respect to the demand of one furnace alone, or the overall demand of the plant's taking?

A. It operates on the total load.

Q. The total load?

A. Total load.

(Testimony of R. L. Cunningham.)

Q. So that if that demand meter were set as you have testified, at 6384 kilowatts and was in operation, the plant could not have taken at any one instant more than 6300 kilowatts of power without shutting off the furnace? A. That is true.

Mr. Metzger: That's correct.

The Witness: That is right.

Q. I think you testified after November 24th, and continuously thereafter, not more than one furnace has operated. A. That is true to date.

Q. And there is no record that this demand limiter ever operated to curtail the demand or to shut off a furnace during that period?

A. Well, it would shut a furnace off after it got up to 6384.

Q. Have you any record that the taking did get that high?

A. Well the only record we would have is this recording meter—this recording.

Q. Well you can't tell from that, or you haven't observed from that whether there was apparently any cutoff—automatic cutoff by reason of the action of it?

A. During this disputed time there was no cutoff of power.

Q. Or at any other time, do you have any record or knowledge or indication? [63]

A. Well we have the records, that is true. We have the records and there would not be any—in other words, from the demand limiter, when the power got up to 6384 the demand registered that.



(Testimony of R. L. Cunningham.)

That is what the device was for, and it would immediately kick the power off and shut all power to that furnace off.

Q. Well I am asking you if there is anything in any record that you have that indicates that after November 24th, 1945, this demand limiter came into operation to prevent your taking exceeding 6384?

A. That is true. There is no record going over in excess of 6500.

Mr. Carothers: We object to—we think the record——

The Court: Oh, he has answered now. I will let the answer stand.

Mr. Carothers: Go ahead.

Q. Mr. Cunningham, just briefly, counsel has asked you if you received a letter from the City dated in September—I think its Defendant's Exhibit A-3. That wasn't the only letter you received during that period while this discussion was going on, was it?

A. No, it was not.

Q. There were other letters before and after that date from the City?      A. There was.

Q. And the interchange of correspondence on that subject did not terminate until the letter of October 13th, I believe, Plaintiff's Exhibit 2, wherein Mr. Darland said "We feel that little more can be accomplished by a further exchange of correspondence."      A. That is correct.

Mr. Metzger: That's all.



(Testimony of R. L. Cunningham.)

### Recross-Examination

By Mr. Carothers:

Q. Well now will you just name any letter written to you by anybody in the employ of the City during that period, other than the wire of August 27th, the letter of September 14th, and the letter of October 13th? Just what other letters did you receive?

A. I can't quote the dates. You have mentioned three of them.

Q. Will you examine your file and determine if any other letter was written to you by the City of Tacoma?

A. Counsel has the file.

Q. I will hand you a file, examine it and state what telegrams or letters that you find from the City of Tacoma.

A. Well, I don't question—what is the—— [65]

Q. Well counsel asked—said there was correspondence going on during this period from August 31st to October 13th, other than had already been mentioned. What was it?

A. I made no statement to that effect?

Q. Well——

A. That is correspondence. There was wires, telephone conversations and two letters that you quoted yourself.

Q. Now you admit that there was just those two letters, is that right? And the wire.

A. There was a wire. There was telephone con-

(Testimony of R. L. Cunningham.)

versations; two letters that I remember because you mentioned them. I can look through the file if you wish.

Q. Now you said there was other letters.

A. I didn't say there was other letters.

Q. Well you answered Mr. Metzger's question and said there was other correspondence.

A. You are becoming too technical. I didn't name the letters.

Q. We are asking you to name them now.

A. Well do you want me to recite the whole affair again? I mean, each letter and wire?

Q. If you find in your file any correspondence or telegrams from the City of Tacoma, between August 21, 1945, and October 13, 1945, other than the one telegram and the September 14 letter, why, that's what we want. Any other correspondence from the City. [66]

A. First, on the 24th I talked to Mr. Darland on the long distance telephone.

Q. All right, now stop right there. That's the only——

A. That's the first—after the first notice.

Q. Yes.

A. 21st, 24th, and then there is a wire.

Q. The 27th.

A. Wire received from the City on the 27th. A wire from myself to Mr. Darland on the 30th of August; a letter on August the 30th; the letter from the City of Tacoma on September the 14th; a letter to the City of Tacoma on September 25th, and the October 13th letter from the City to ourselves.

(Testimony of R. L. Cunningham.)

Q. Now on this demand limiter—load limiter we will call it, I suppose, that's a device that was entirely under your control over there, was it not?

A. Well, it was under the operator's control.

Q. It was under the Company's control and not the City?

A. It was under the Company's control.

Q. Yes, and it could be set as you saw fit, is that right?

A. It would be set at whatever furnace operation we was running on. It was set at 6384 for 6500 operation, or for twelve five we would probably set at for 12,000.

Q. Or you could set it at 7500 if you saw fit, couldn't you?

A. If we wished to breach our contract we might, yes. [67]

Q. You said this morning that these instruments were all in good shape, did you not? A. I did.

Q. Don't you know it to be a fact that on numerous occasions your local men over there contacted City representatives and asked them to check your instruments; that you were having trouble with them? Do you know anything about that?

A. The City I think, had the privilege of going over our amp meters and volt meters on the furnace board at various times. I don't believe the City ever repaired the GMS 11 demand limiter.

Q. Well now you have not exactly answered the question. Do you know whether or not it is a fact that your local men over there, requested the City

(Testimony of R. L. Cunningham.)

to come in and go over these various instruments; that they were having trouble with them, they couldn't get them operating correctly?

A. Well it all depends on what instrument you are talking about. The City repaired some instruments. They didn't repair the GMS 11 demand limiter. It was taken care of by the manufacturer, the General Electric, nor the Westinghouse recording meter, the City never had in their shops.

Mr. Carothers: That's all. [68]

Mr. Metzger: That's all.

The Court: Just a moment. It is your contention that you were relying upon this letter of August the 21st, I think it was, of 1945, as your notice——

The Witness: Yes, Your Honor.

The Court: Under the terms of the contract, and you recognized a liability to pay for 30 days after you served notice.

The Witness: Yes, sir.

The Court: So in that letter you didn't fix any date.

The Witness: No, it was up to the City. We interpreted it to be at least 30-day notice. Now the City would have to agree too, and it was assumed that it would have occurred on September 21st, and we were ready for that suspension on that day.

The Court: But actually you had occasion to operate this second unit for some considerable time off and on following that, up until November 24th?

The Witness: Well the log—the operating log

(Testimony of R. L. Cunningham.)

which I have here, it was operated—it was operated starting on the 24th of September, and it operated till a portion of October the 7th, and then we——

The Court: Now I think you have given those dates. [69]

The Witness: Operated 36 days in November—or 36 hours.

The Court: So you didn't definitely shut down and not operate that unit at all any more until November—sometime in November.

The Witness: November 24th is the last overlap.

The Court: And during all of that time there was more or less of a dispute between your concern and the City, as to when this matter was going to be finally concluded and you would quit operating and be relieved of liability?

The Witness: That is right, Your Honor.

The Court: Well now, on November 24th, was there any representative of the City over there?

The Witness: No, there wasn't any.

The Court: Was there any word sent to them the plant was down then permanently and definitely?

The Witness: No there was not. Their meter man would arrive on November the 30th to read the meter. That is as near as——

The Court: At the end of the month?

The Witness: At the end of the month.

The Court: And you didn't talk to him or don't know what was said to him?

The Witness: Well, at the end of each month

(Testimony of R. L. Cunningham.)

he drops the demand back to zero, and it's a fresh start, as if we started the plant up that day, in a sense. He drops this——

The Court: Well, what I am trying to get at, aside from your letter advising the City you were going to terminate your liability in accordance with the terms of the contract in 30 days, and that didn't occur because of differences and misunderstandings. Now then, when you did terminate the use of electricity on November 24th, but the City apparently wasn't even informally advised until November the 30th when their representative appeared there to read the meter.

The Witness: Yes, they were not informed on September twenty—they were not informed that the suspension took place on the 24th of November, but the nearest to that would have been November 30th.

The Court: And then I assume they came of course, and read the meter again?

The Witness: December——

The Court: December——

The Witness: January, February and they came again on February 26th.

The Court: Well was there any reason why they weren't notified either on the 24th or 30 days preceding the 24th of November that this unit was going out entirely and that you were going to stand on the contract?

The Witness: There was no notice 30 days prior to November 24th.

The Court: But was there any reason why there wasn't?



(Testimony of R. L. Cunningham.)

The Witness: There was no reason. We still were protesting these payments, and probably hoping that the City would agree to a suspension.

The Court: But you knew the City was taking the position that they were going to hold you for 12 months from the time you started up in February, '45 to February '46?

The Witness: That was in these letters.

The Court: Well did these letters or these telegrams that are not in evidence here, anywhere indicate that you were going to stand on the 12-month period of continuous service as being that before conditions arose?

The Witness: That was our contention in all these letters, the 12 consecutive months meant the initial 12 consecutive months, and that had already passed. It was part of the 27 consecutive months that we had operated, and the shutting down on September 21st [72] was a—we had the right to shut down on that date.

The Court: Well of course you notified them that you would suspend operations. You didn't say that in 30 days from the date of this letter,—

The Witness: No.

The Court: —but you just merely said you were giving them 30 day notice, but in that letter of course, you didn't say that was going to be a permanent shutdown. You said that was for the purpose of meeting certain conditions that you had in the plant.



(Testimony of R. L. Cunningham.)

The Witness: Well, if they would have agreed—

The Court: So what I'm trying to get clear, did you ever either directly tell them, or someone representing the Ohio Company, to your knowledge, or did they ever say anything to you that there was going to be a permanent shutdown of this unit—

The Witness: Not permanent—

The Court: —before it actually occurred—that is, permanent within the bounds of reason. You always have the right to later negotiate for power again and start resuming. That's under your contract.

The Witness: Well when we relinquished the power by notice of August 21st, we were under—we knew to get the power back they would have to mutually agree to give it to us, under the terms of the contract. [73]

The Court: No, but they didn't accept your relinquishment in August. They disputed it, and there is where your differences arose, and they didn't have the benefit of your relinquishment, so far as *having ready* to serve, being relieved from the ready to serve obligation until they read your meter on November the 30th, and what I am trying to find out is whether then, was there anything there then said or done, that this plant—this unit is down for an indefinite period?

The Witness: Well, there is nothing more than the fact that we were operating the one furnace, and they would recognize that, whether there was anything said verbally to them when they arrived at the plant, or—

(Testimony of R. L. Cunningham.)

The Court: You assumed that they would recognize that. That's all, I just wanted to——

Mr. Carothers: I would like to pursue that further if I may.

By Mr. Carothers:

Q. The meter was read by the City of Tacoma's representative on the 30th of November, wasn't it, —or 30th of November. Are you claiming that any written or oral notice was delivered to the meter reader at that time that you weren't going to operate in December?

A. I didn't claim that.

Q. Well I say are you now claiming that?

A. I don't believe that I have claimed that.

Q. Well then, as I recall it, the meter reading for the month of November—the demand showed something over ten thousand, is that correct?

A. That is correct.

Q. So that our meter reader would—he wouldn't know whether you were going to go on and operate again in December, or not, would he, from that reading?

A. He couldn't assume that, no.

Q. So that unless you specifically notified him orally or in writing at that time, why, the City would have no way of knowing that you had shut down on November 24th, or that you intended to stay down, isn't that true?

A. He had notice on August 21st, and——

Q. Well now—okeh, but subsequent to that.

A. Well that's the only notice. We gave notice on August 21st.

(Testimony of R. L. Cunningham.)

Mr. Carothers: That's all.

Mr. Metzger: That's all, Mr. Cunningham.

(Witness excused.) [75]

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### WILLIAM PRITZ

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Metzger:

Q. Will you state your name and connection with the Plaintiff, Ohio Ferro-Alloys Corporation?

A. William Pritz, works' manager.

Q. Works' manager where?

A. For the Tacoma plant.

Q. The Tacoma plant. How long have you occupied that position?

A. Since the 10th of October, 1946—or '45.

Q. 10th of October, Nineteen——

A. '45.

Q. '45. Mr. Pritz, what devices does the Ohio Ferro-Alloys Corporation have for the determining of the demand—electrical demand imposed on the City's facilities, or limiting that demand?

A. Well, we have a——

Mr. Metzger: Speak a little louder, please. I can hardly hear you.

(Testimony of William Pritz.)

A. (Continuing): We have a Westinghouse recording demand limiter, which records the total consumption of the [76] plant at any given time, and had a GM-11 General Electric demand limiter, which also recorded the plant consumption.

Q. Beg pardon?

A. Which also recorded the amount of power that was being used at any time.

Q. You say it recorded? A. Yes.

Q. Did it leave any written record?

A. The Westinghouse left a written graph by the half hour.

Q. Did the General Electric demand limiter leave any written record?

A. No, it did not leave any written record.

Q. Now, those devices were in operation, were they, since you've been there? A. Yes, sir.

Q. At the plant? A. Yes, sir.

Q. Have they been in good operating condition, or otherwise, during that period?

A. The meters, to the best of my knowledge, were constantly checked to the best of our ability, and if they were not in good condition, or we had any idea that they might not be, why, we had them checked immediately.

Q. By whom?

A. Usually by the General Electric representative, and one [77] of our men who had experience in that type of work.

Q. Well, now, Mr. Pritz, as I understand it, this Westinghouse demand limiter, you say, makes a written record every half hour.

(Testimony of William Pritz.)

A. It records it on a graph. It records the power reading on the graph.

Q. Oh, a graph? A. Yes.

Q. What is—your duties on occasion cause you to examine that graph?

A. Well, I check it constantly, three times—well, three times in 18 hours,—16 hours.

Q. I see. Every day as I take it?

A. Every day.

Q. The graph from, we will say September, 1945, to the present date would be a very long sheet of paper if it was a continuous sheet of paper, I take it?

A. Yes, the rolls that we have I think run around three weeks—three or four weeks.

Q. About how many feet to a roll?

A. I don't know. There must have been 40 or 50 feet.

Q. 40 or 50 feet?

A. They are quite long.

Q. Now this identification marked Plaintiff's 3, that as I understand it, is a sectional lay of this recording graph [78] that the Westinghouse recording meter makes? A. That is correct.

Q. Can you identify the days covered by that graph—that side of the graph on which the identification Plaintiff's Exhibit 3 is marked?

A. I can.

Q. What days was it?

A. It was the 31st to the 2nd of January—31st of December to the 2nd of January.

(Testimony of William Pritz.)

Q. What years?

A. '45 and '46, one day in '45 and a couple of days in '46.

Q. I see. Now, in your examination of this recording graph—maybe I have asked this question, if I have, I apologize, but was there any record of any demand on that graph between November 24th, 1945, and the present time in excess of 6500 kw.?

Mr. Carothers: Just a minute, your Honor, we object.

The Court: Oh, he may answer. The objection will be overruled.

Mr. Carothers: To answering that question. The record is the best evidence.

The Court: Let's get along.

Mr. Metzger: Do you understand the question, [79] Mr. Pritz?

A. No, I don't understand that question. I would like to ask one question. When was the 10,000 demand recorded, in '45?

Mr. Metzger: Well, according to the pretrial order it is——

The Court: Ten thousand plus was recorded in November, 1945.

The Witness: Well, that would show on this sheet.

Q. Well, I am asking you, after the 24th day of November.

A. Well, after the 24th day of November——

Q. 1945, was there any recorded demand in excess of 6500?

(Testimony of William Pritz.)

A. Well, to the best of my knowledge it was never over 6500 since the 24th of November.

Q. And after November 24th, 1945, at what figure or number of kilowatts was the demand limiter set? A. I had the men set it at 6384.

Q. Six thousand three hundred and eighty-four?

A. Yes, sir.

Q. It has been continuously set at that since that date? A. Yes.

Mr. Metzger: That is all. [80]

### Cross-Examination

By Mr. Carothers:

Q. Well, this demand limiter is susceptible to being reset very easily, is it not?

A. Yes, sir. Well, not too easy. It can be reset.

Q. And that is entirely under the company's jurisdiction over there? A. It was.

Q. Yes. I assume that this entire record taken from this recording meter is available?

A. Yes, sir.

Q. And can be inspected, is that true?

A. Yes, sir.

Q. Where is it?

A. Well, I think we have it in our plant, in the main office.

Q. Can arrangements be made so representatives of the City may inspect that record?

A. Yes, sir.

Q. How do you explain the fact that out of the middle of that record there is torn two or three days only?



(Testimony of William Pritz.)

A. The reason for that is the demand was all right up and through the 31st of December, when the City's demand meter was set, at a reading higher than 6500, so that was the period in question, I personally tore this off, myself, or it was tore off and we sent it in. I [81] marked it off. I sent the whole roll, but I marked the period where the demand meter showed that it was sent up, because I checked the meters personally myself, and from the time I last saw it until when I came back again, the meter had been kicked up.

Mr. Metzger: Which meter are you talking about?

The Witness: The City's meter. That is why I noticed the chart. That is why I checked our chart to see when and if any—our chart showed the reading was at that time, as I checked it three and four times in eighteen hours.

Q. Well, so far as the City's demand meter is concerned, it has no way of determining—the meter reader has no way of determining what day of the month that that maximum demand was reached, isn't that true? A. That is correct.

Q. So that what your recording meter may show on December 31st, does not prove anything so far as in the month the maximum demand is concerned, isn't that true? A. That's right.

Q. You were—when you were checking your meter you checked the City's meter, too, is that correct?

A. That is correct.

(Testimony of William Pritz.)

Q. And did you find a different demand on the two meters? [82]

A. The practice of course would be to check the City demand meter first, because that is what we are billed by.

Q. Yes.

A. And then if the City's demand meter was all right, well I would just pass over ours, because we were interested in what we would be billed on. They were at that time, they were close to one another, so it was easy to read both of them practically at the same time.

Q. Are you a—what is your trade? I appreciate that you are——

A. Well, I'm——

Q. Employed over there, but what is your actual trade or profession?

A. Furnace operator, you might say.

Q. You are not a meter expert at all?

A. No, sir.

Mr. Carothers: That's all.

Mr. Metzger: That's all, Mr. Pritz.

(Witness excused.)

Mr. Metzger: I may say, your Honor, there has been some contention made by the City and it's incorporated in the pretrial order, that there were demands [83] higher than 6500 occurring after November 30th. I think that is a matter of proof by the City if they are standing on that point. Now I don't want to go into it in our case in chief, be-

cause I think that is a matter for the City to prove, but I don't—a lot of it has been touched upon in cross-examination here, but I have this record of the days I think that are in question, but I should not want to be precluded from rebutting, if the City goes into that question.

The Court: I don't think you should devote too much time. You ought to be able to agree pretty well. That's one of the purposes of the pretrial conference on those facts. If the City has some documents that indicate there was a use of electrical energy in excess of 6500 kws. during these months following November 24th, there is no reason why it should be kept under cover, and if, likewise, the plaintiff has some record——

Mr. Metzger: We are not seeking to keep anything under cover. We have the record here for the days we think is in dispute.

The Court: And that is what I had hoped, that all those matters—I hoped you worked them out between yourselves. It appears to the Court at this stage of the case, that the major issue of course is [84] first, and I would want some evidence on this, as to whether this 12-month period as provided for in this contract, had actually run when this situation by reason of the government's action arose, and a determination on that issue is whether that falls under Section 19 of the contract.

I haven't had any evidence thus far as to just what this war order was.

Mr. Metzger: Well, that's true, we'll offer that, your Honor.

The Court: And then, be that as it may, whether there was anything in the facts, outside of the first written notice of an intention to be relieved from liability for six thousand kws. for the second unit, whether there was anything in relation to this dispute that was rather long drawn out, and at times were quite far apart, but could be taken as constructive notice.

Mr. Metzger: Yes, sir.

The Court: That the plaintiff had ceased and when that occurred, and that's why the Court asked the questions I did.

Mr. Metzger: I understand.

On the first point that your Honor has mentioned here, the record as made by the pretrial order that this second furnace, or the load for the second [85] furnace, was taken originally in November, 1941—taken and paid for continuously for 27 months before the suspension under the—by reason of the War Production Board's orders, or——

The Court: I appreciate that.

Mr. Metzger: So that period of 12 consecutive months was then long passed.

The Court: Well, the Defendant contends that that suspension after 27 months was the end of that transaction and there was a new one beginning, so the parties themselves went outside of the written contract and made an adjustment there——

Mr. Metzger: That's right.

The Court: —and they took this up and that the new one—the new obligation commenced in February of '45, and automatically thereafter continued until '46, before the 30-day notice could become an effective notice.

Mr. Metzger: No, I think neither party contends that, your Honor. The question—the 30-day notice could be—I mean it could be effective all right, except as to the question of payment. Now if you mean effective to reduce payment, then you are correct.

The Court: Well, that is what I mean.

Mr. Metzger: Well, now, at this time we would [86] like to offer the testimony of Mr. R. D. O'Neil, which was taken—his deposition was taken by stipulation of counsel. He had to be in Spokane. He was subpoenaed as a witness on behalf of the Plaintiff.

The Court: Very well, you may proceed.

Mr. Metzger: I don't know what your Honor's practice is about depositions.

The Court: I haven't any rigid practice. I prefer to have one person take the witness stand and the other read and the other answer.

Mr. Metzger: If I may be construed to be the witness then.

The Court: Very well.

Mr. Metzger: This deposition was taken under stipulation which appears in the deposition.

The Court: You don't challenge the deposition?

Mr. Carothers: Your Honor, we renew the ob-

jection we made at the time of the taking of the deposition. This deposition is the deposition of the former Commissioner Robert D. O'Neil, and the testimony that is embodied in the deposition deals with conversations that he had with representatives of the Ohio Company, during the period of negotiation leading up to the execution of the contract, and also that his understanding and his thoughts and ideas and opinions about [87] the terms of the contract, itself, and we object on the ground that—to any of this testimony on the ground that the contract is plain and the language of the contract is plain and unambiguous and not susceptible of oral testimony to vary the terms thereof, and also that any—particularly as to those conversations during negotiation—preliminary period of negotiation were not material, because the final contract as drafted expresses the intent of the parties.

The Court: Objection will be overruled and exception allowed.

You may proceed. [88]

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(Deposition of R. D. O'Neil.)

“R. D. O'NEIL

produced as a witness on behalf of the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

“Direct Examination

“By Mr. Metzger:

“Q. Your name is R. D. O'Neil?

“A. Yes, sir.

(Deposition of R. D. O'Neil.)

"Q. And you are presently residing at Raymond, Washington? A. Yes, sir.

"Q. And your occupation there is what, Mr. O'Neil?

"A. Manager of the Public Utility District No. 2 of Pacific County.

"Q. How long have you held that position?

"A. Since December 23, 1944.

"Q. And if it is not too embarrassing a question, how old are you now, Mr. O'Neil?

"A. I was sixty years old the 3rd day of last December.

"Q. Were you at one time an elective officer or commissioner of the City of Tacoma?

"A. I was.

"Q. What office did you hold and when?

"A. I was Commissioner of Public Utilities from, I believe, [89] the 3rd day of June, 1940, until the 5th day of June, I believe it was, 1944, if I remember the dates right.

"Mr. Carothers: That is near enough.

"Q. During that time, Mr. O'Neil, did you negotiate, on behalf of the City of Tacoma, and execute for the City, a contract for the sale of electrical energy to Ohio Ferro-Alloys Corporation, plaintiff herein?

"A. I negotiated the contract, I believe. If I am right, Howard."

Mr. Metzger: By "Howard" he's referring to Mr. Carothers.



(Deposition of R. D. O'Neil.)

"A. It had to be passed on by the City Council, so I guess the execution of it might be by the City Council. They had to approve it.

"Q. It had to be approved by the City Council?

"A. I negotiated the contracted.

"Q. You negotiated the contract, but to your recollection it was approved by the City Council?

"A. It had to be approved.

"Q. And was later signed by you on behalf of the City?"

Mr. Metzger: There was no answer to that question. There was an interruption there.

"Q. Now, showing you a document which is entitled 'Contract between City of Tacoma, Department of Public Utilities, Light Division, and the Ohio Ferro-Alloys Corporation,' [90] recites that it was executed on March 21st, 1941. I will ask you if you recognize that document?

"A. Well, it is my signature. Here is the City Clerk's name and the Mayor's name, and other than that, I guess——"

Mr. Metzger: Then Mr. Carothers interposed.

"Mr. Carothers: We admit that the document is a duplicate of the original contract in question.

"Mr. Metzger: For the purpose of identification may we substitute for that, a typewritten copy thereof, and have it marked as Exhibit 'A'?

"Mr. Carothers: We consent that a copy may be substituted for the original and marked.

"Mr. Metzger: Would you mark this Exhibit 'A' for identification, please?

(Deposition of R. D. O'Neil.)

“(Whereupon said contract was marked Plaintiff's Exhibit ‘A’ for identification.)

“Q. (By Mr. Metzger): Mr. O'Neil, with whom did you negotiate this contract?

“A. Well, Mr. Jones, I believe, was the first representative of the company to come to my office in regard to that contract. Then, later on, Mr. Weitzenkorn, and I don't know——”

Mr. Metzger: He then turned to Mr. Carothers and said:

“Was there another party that was a third representative [91] came to you?

“Q. This is more or less informal, but you will have to testify to your recollection.

“A. Well, there were those two men, but I am not sure whether there was this third company representative.”

Mr. Metzger: Presumably this third company representative.

“I don't know; I don't remember whether there was a third one. I know Mr. Jones came first, and then Mr. Weitzenkorn, and we both got into the negotiations over a very considerable period on the thing.

“Q. Where did these negotiations take place?

“A. At my office on the fourth floor of the City Hall.

“Q. Do you remember about the date of the last negotiations?

(Deposition of R. D. O'Neil.)

“A. No, I can't recollect the date. The date that you told me there would be as near as I could say.

“Q. Well, actually wasn't it a fact, Mr. O'Neil, that these negotiations took place, and there was a meeting of the minds between yourself and these representatives of Ohio for quite a considerable period of time before the formal contract was written up, and the ordinance passed, and the contract signed?

“A. My recollection is, I think it was between three weeks and a month from the time we first—about three weeks to a month, somewhere in there, if I recollect right. The [92] meeting lasted over that period of time.

“Q. Mr. O'Neil, this contract provides for furnishing, by the City, of two different blocks of electric energy, one of 6500 kilowatts, and one of 6000 kilowatts.

“A. I don't know as we would call it two different contracts.

“Q. This one contract provides for the furnishing of two different blocks.

“A. The basic contract was for 6500 kws. Then, the additional block was based on taking the first 6500. In other words, they could not have got the second one without the first one being taken, and they were allowed one 6000 kilowatt block that would not be governed by the same circumstances and the same conditions as the first one, I believe.

“Q. I see. In other words, the contract provided that—it was agreed to provide initially that

(Deposition of R. D. O'Neil.)

Ohio would take, for a term of ten years, a block of 6500 kilowatts?           A. Yes.

“Q. Of power?           A. Yes.

“Q. And to insure the performance by Ohio of that part of the contract, an escrow fund was provided, is that correct?

“A. Yes, it would be paid for during the first four years of the contract, and to be then held in escrow until the end of the seven years and then paid back in quarterly installments, [93] and, at the end of the ten years, the whole amount would be returned to the company, of the amount of the escrow. I think that is it.

“Q. Then, the second block of power was to be furnished on different terms than the first block?

“A. Yes, in the second block of power there was no escrow required on it. The provisions——

“Mr. Carothers: Just a moment. We object to him reciting the provisions unless he is going to recite them verbatim as they are in the contract. The contract speaks for itself as to the provisions of the second block of power. We object.”

The Court: Oh, I think I will let you read his answer.

Mr. Metzger: Well, he didn't—he made no answer, because at that point I interposed another question.

The Court: Very well.

Mr. Rybolt: Mr. Metzger said: “All right. Your objection will be noted, of course.” Then this further question:

(Deposition of R. D. O'Neil.)

“Q. Mr. O'Neil, I don't want to interrupt your answer, but I wish you would state, as near as you can, what was said and agreed to in substance by yourself and the representatives of Ohio Ferro-Alloys Corporation, with respect to [94] the second block of power when the contract was agreed upon, what was to be incorporated in the contract?”

Mr. Metzger: At this point, Mr. Carothers makes the objection that he orally renewed—before.

The Court: Well, I think it is subject to objection, that it would be an attempt to vary the terms of the agreement unless there is something ambiguous about it. Is there any contention that his answer is different in substance from the terms of the contract? I ask that because it might tend to make it easier for the Court.

Mr. Metzger: Well, if your Honor please, all this whole question has already been testified, when we asked for this suspension power, the City's reply through Mr. Garland was that they didn't know how to interpret the contract. Then——

The Court: Well, I don't think I want an extended argument on that at all.

Mr. Metzger: We think the contract is ambiguous on its face. We're only trying to explain the 12 months' period——

The Court: Well, go ahead and read the answer, whatever it is, and I'll allow exceptions.

Mr. Rybolt: Mr. Metzger said: “Go ahead, [95] Mr. O'Neil.”

“A. Well, in the second part of the contract,

(Deposition of R. D. O'Neil.)

the block that—if I can remember what went on—first, I believe Mr. Jones will agree with this: In the copies that were re-written of the contract from time to time, that they could ask for as many blocks of six as they wanted to, and I ruled that there would only be one block attached to that initially, which would be contingent to the first initial block of 6500 that they contracted for. In the second block they were not required to deposit any amount in escrow. They were to pay for the power monthly, but they were required to use it for a period of not less than one year before they could drop it; in other words, before they could drop that second block, and that upon dropping the second block at any time, it''

Mr. Metzger: No, I'm not reading this—"but they were required to use it for a period of not less than one year before they could drop it; in other words, before they could drop that second block, and that upon dropping the second block at any time, it would be the City's sole decision as to whether they would come on again or not. In other words, the City could say no, and the company would have no rights under the contract for the second block. I might cite to you my reasons for that, if it is material. [96]

"Mr. Carothers: No, I object.

"Mr. Metzger: The reasons would not be material. Go ahead and omit the reasons.

"A. All right. Keeping this in mind that the City had the sole control, it was the intention that



(Deposition of R. D. O'Neil.)

they would go ahead and use it; if they dropped it, if the City wanted to take it on again, they would do so, if they did not, to tell the company no, or they might make any additional stipulations regarding the coming on again that they might wish to make at the time that they picked it up after having dropped it once. Now, other than that, I don't think there was any stipulation made regarding the second block, not that I know of.

“Q. Was there anything said by you, or something to the effect that if the City permitted Ohio to resume the taking of the second block that they would then have to pay only for the energy used, or pay for it only during the time they took it?

“A. I don't think that question ever came up at that particular time, because keeping in mind again that the City had the sole control over the matter, why it was not my—at least, it did not occur to me at that time that there would be anything arise about the second period coming up on it. On the operation of a furnace of that kind, they don't usually start up for a period of three months and run it. Of course, that could have happened, but we did require the first year because of our transformer installation, so we would be guaranteed some return to pay for that investment, and in the labor we put on it. So, we did require the first year, at least one continuous uninterrupted portion of it.

“Q. Now, Mr. O'Neil, taking a look at this contract—



(Deposition of R. D. O'Neil.)

"The Witness: This is the first time I've seen these copies since then, so my memory has to be pretty good.

"Q. Now, the contract, in several places speaks of Article 10-A, which provides, "The corporation"—meaning Ohio—"may permanently drop its additional six thousand kilowatt power requirements, at any time, after one year's billing (twelve consecutive months) at the specified rate." Now, in the next paragraph it says, "If and when the corporation should drop its additional six thousand kilowatt requirements, either temporarily or permanently, and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load"—then, it goes on to something else.

What was your understanding and intention with respect to this twelve consecutive months? Was that to be one payment, or one time only, or more than one?

"Mr. Carothers: Just a moment. We object [98] to that testimony. It is up to the Court to construe the language in the contract, and not for Mr. O'Neil to construe the language, or what his intention was. The language speaks for itself. I object to any testimony as to what his understanding of that provision was that was just read."

The Court: He may answer. The statement made by counsel is substantially correct. If the contract can be construed as written, it must be—I'll let him answer and if I consider it material, I'll use it, and if I do not, I'll reject it.

(Deposition of R. D. O'Neil.)

"A. Well, for my part, I feel they referred to the initial beginning twelve months period. Now, that was my understanding at the time, of course.

"Q. That was your understanding at the time?

"A. Yes.

"Q. Now, not to put words in your mouth, but to clarify this, see if I am correct in what my understanding is of what you have said: That it was your understanding, at the time this contract was negotiated and when it was executed, that this provision for payment for twelve consecutive months applied to the initial taking of the 6000 kilowatt block, is that right?

"For the reason as just stated in the contract, that the City had the sole decision as to whether it could come on [99] again; we might decide that we would let them have power for six months, or we might allow them to have power for another year period. So, having the full control of the City for that additional load, whether they come on again after dropping this six thousand kw., we could make any stipulations we might desire regarding the continued use of that condition.

"Q. So, that is the way the contract was understood and drawn, that the twelve consecutive months taking applied only to the initial taking?

"A. As I felt about it, yes.

"Q. And that was discussed with representatives of Ohio?

"A. I don't remember whether we discussed that. We discussed a lot of things in three weeks. My memory is not good enough to recall.

(Deposition of R. D. O'Neil.)

"Q. Well, I don't know when I asked you"—it should be whether, I believe—"I don't know whether I asked you that question before"—no, I'm wrong, I'll read it again. "Well, I don't know when I asked you that question before for clarification, whether my understanding was correct. I thought you nodded your head affirmatively.

"A. Which question was that?

"Q. When I said that it was my understanding of your statement that this provision in the contract for payment for twelve consecutive months applied only to the initial [100] taking of the second block. A. I said yes.

"Q. All right. That is just to make sure."

Mr. Rybolt: Then an instrument was marked Exhibit "B" for identification, and Mr. Metzger said: "It is our understanding with you that I may use copies rather than the originals, Mr. Carothers?"

"Mr. Carothers: That is entirely all right."

My Rybolt: Then Mr. Metzger asks this question:

"Q. Mr. O'Neil, I hand you a copy of what purports to be a letter from you to Mr. Weitzenkorn. I wish you would look at it and tell me if that is a letter that you wrote to Mr. Weitzenkorn?

"Mr. Carothers: If that is the October 4th letter, we admit that it is a copy of the letter, October 4th, 1941, by Commissioner O'Neil to Mr. Weitzenkorn.

(Deposition of R. D. O'Neil.)

“The Witness: That is my letter but it is not my signature. My signature has been copied, of course.

“Mr. Metzger: Yes, it is merely a copy. We offer the same in evidence.

“Mr. Carothers: No objection.”

Mr. Rybolt: Do you have those letters, Mr. Metzger?

Mr. Metzger: Yes, they're attached to the [101] deposition.

Mr. Rybolt: Oh, they are. All right.

(“Whereupon, Exhibit ‘B’ was offered into evidence.”)

Mr. Rybolt: Would you care to look at them at this time, Your Honor, or——

The Court: There's no objection, I understand.

Mr. Rybolt: No.

The Court: So they will be admitted.

Mr. Rybolt: The next question by Mr. Metzger:

“Q. Mr. Weitzenkorn, to whom that letter is addressed, is the Weitzenkorn to whom you have previously referred as one of the negotiators on behalf of Ohio Ferro-Alloys Corporation?

“A. It is.

“Q. Mr. O'Neil, what was the purpose of the City's requirement that Ohio must pay for a full year on the initial taking of the 6000 kw. load?

“A. Well, any power company in picking up a load of that kind, must make certain expenditures as the labor of installation, possibly the investment in the transformer bank, so they must be guaranteed a certain amount of return in order to justify the expenditure.

(Deposition of R. D. O'Neil.)

"Q. Yes. [102]

"A. So, we put a year there as a minimum amount that we could expect for the expenditure we went to, you see.

"Q. All right. In other words, that payment of a minimum of a year was to safeguard the City against the investment that it might have to make to serve that load?

"A. At least in part. It might not safeguard it entirely, but it would go a long ways to do it.

"Q. But, you deemed it, on behalf of the City, sufficient to safeguard that? A. Yes.

"Q. Once that was paid, there would probably be no additional investment on the part of the City to serve that load if it was later served?

"A. No, however, with these qualifications: If, in the meantime the City had taken on other loads that took up this slack, then, of course, the City would have the right to say, "You cannot have the load because—." In other words, suppose that we wanted to take on the power again after this year was up and the City had sold the power, committed it to somebody else after they had dropped it; then, of course, the City might have gone to considerable expense to get the additional block, but they also had the right to refuse to serve it if they wanted to.

"Q. That is right, under the contract they only had to serve [103] the additional block after it had been dropped once if, in the City's judgment, they had surplus power.

(Deposition of R. D. O'Neil.)

"A. Or, were capable of doing so under normal circumstances, you see.

"Q. Yes. That was solely in the City's judgment?

"A. If I read the contract right, or remember it right, why that was it.

"Q. And the City, in selling surplus power for this second Block, would be selling power that the City had available, but which it was not otherwise realizing any return upon, is that right?

"A. I don't know whether I would say it in exactly those same words or not, but it was power that we could procure, or that we were generating ourselves, which was advantageous to sell to them under those conditions.

"Q. Well, Mr. O'Neil, let me see if I again understand you. If, in the City's hydro-electric generation, it had a generating capacity which was not being used up by the normal demands on the City, that the excess of that generating capacity over the normal demands, as you put it, would be surplus power?

"A. That is the term commonly used.

"Q. That is the way you would understand it, I mean, surplus power would include that condition, at least?

"A. Yes, that would include that condition.

"Q. And to sell surplus power of that kind to Ohio would be merely giving the City a return on generating capacity which would otherwise be unremunerative, is that not right?

"A. That is right, yes.



(Deposition of R. D. O'Neil.)

"Q. And that power, in other words, cost the City what you might call the incremental cost of additional labor, if anything, to service it?

"A. Yes, I think that is right also.

"Q. That is right. In other words, the normal load would be carrying all the overhead, the investment charges and the general charges of operation; this surplus would only cost whatever additional men, if any, you might need, and what bookkeeping there might be, for meter reading, if any there might be, extra?

"A. Normally the way we look at it, there will be no added operating cost, or would be very inconsequential.

"Q. Inconsequential, that is right. That is the kind of power the contract contemplated would be furnished Ohio if the second block of power was subsequently taken on?

"A. Even if it was dropped and picked up again, you mean?

"Q. Yes.

"A. I would say that I would not think that the City would have considered taking on the block the second time unless they could do it in that manner, you see. [105]

"Q. And the contract so provided?

"A. Yes, the contract so provided.

"Q. Now, Mr. O'Neil, I don't think it is material especially, but do you recall when Ohio first took on this second block of power?

"A. I don't remember the day, but I think it was fairly soon after we took it on.



(Deposition of R. D. O'Neil.)

"Mr. Carothers: I think there is no dispute about that.

"The Witness: I think it is in the record.

"Q. If I would say to you that it is in November of 1941, though, would that correspond to approximately your recollection?

"A. Frankly, I can't remember just when it went on, because there were lots of things going on at that time.

"Mr. Metzger: All right, there is no dispute between the parties on that.

"Mr. Carothers: None whatever.

"Q. Now, do you recall that in the spring of 1944 the Ohio Company dropped the second furnace because of some orders of the War Production Board?

"A. I can't say the date exactly, but I remember they requested them to drop the load and, I believe that I can recall what the conditions were.

"(Exhibit "C" was marked for identification.)

"Q. Handing you a document that has been marked Exhibit "C" which is a photostatic copy of a letter to the City of Tacoma, I will ask you if you recall receiving the original of that letter?

"(Witness examines.)

"Mr. Carothers: That is in the record, is it?

"Mr. Metzger: Yes, that is the first letter in the whole story.

(Deposition of R. D. O'Neil.)

"A. The only thing I remember here are these."

Mr. Metzger: And he pointed to something which I don't know.

"Mr. Carothers: Wait a minute. We admit——

"Q. Do you recall receiving that letter? That is, the original?

"A. I was just thinking about where these apparently deleted words are here. I don't remember of that being the copy. It might have been there.

"Q. I don't know what you are referring to about deleting words.

"Mr. Carothers: That is only a quotation.

"The Witness: I know I received a letter of that kind.

"Mr. Carothers: That is a copy of it.

"Mr. Metzger: The letter handed to the witness is a copy of a letter from Ohio, March 21st, 1944.[107] It is a letter to the City of Tacoma, Department of Public Utilities, received by Commissioner O'Neil.

"(Plaintiff's Exhibit "D" was marked for identification.)

"Q. Handing you paper marked Plaintiff's Exhibit "D", which, I believe the City admits is a copy of a letter written by you, do you recall writing that letter?

"A. Yes, I recall this. In fact, I recall that after receiving that request, that Mr. Kent, the Superintendent, and myself, discussed the matter very fully, and, inasmuch as we were buying power in excess of this load, we felt that the——

(Deposition of R. D. O'Neil.)

"Mr. Carothers: Just a moment. You are not answering the question.

"Mr. Metzger: I will ask him the same question.

"Mr. Carothers: All right. Have you the date of that letter?

"Mr. Metzger: Yes, It is March 29th. It shows on the top right under "Tacoma, Washington." It is March 29th, 1944.

"Mr. Carothers: We admit that is a copy of a letter written by the Commissioner to the Company.

"Q. Mr. O'Neil, you say this letter was written after consultation between yourself and Mr. Kent?

"A. Yes.

"Q. Who was Mr. Kent?

"A. Mr. Kent was the superintendent of the Light Department.

"Q. At that time?

"A. At that time, yes.

"Q. And the statements in this letter about the power situation, the Northwest being in somewhat critical condition and the Light Department of the City purchasing power, are correct statements of the conditions then confronting the City?

"A. It was, yes.

"Q. And it was advantageous to the City, therefore, to shut down the second furnace at Ohio?

"A. If I may state why, I guess, yes.

"Q. Go ahead. Was it advantageous?

"A. It was advantageous, yes.

"Q. All right now. Why?

"A. At that time, you understand, the contract

(Deposition of R. D. O'Neil.)

with the Ferro-Alloys Company was for \$17.50 a kilowatt, and to purchase power from Bonneville Power Administration cost us the same rate. Then, the Light Department paid to the general fund of the City an eight per cent gross earnings tax, and also we paid the two per cent tax to the State, which meant that during this period that we would be actually saving ten per cent of the cost that we would [109] have paid otherwise if we had kept on furnishing the power, you see. So, we were agreeable that there be a lapse in the use of that second block for the period asked for, and they would resume operations on thirty days' notice without paying for what they did not use.

"Q. They would not have to pay for it in the interim? A. No.

"Q. It would not be considered an interruption of their contract; it would be outside the contract, the shutdown, is that right?

"A. That would be my interpretation.

"Q. Is that what you intended by that letter?

Mr. Metzger: Apparently there was no answer to that question.

"Mr. Metzger: We have not offered "C". We now offer "C" and "D".

"(Whereupon Plaintiff's Exhibits "C" and "D" were offered in evidence.)

"(Whereupon Plaintiff's Exhibits "E", "F", "G" and "H" were marked for identification)"

(Deposition of R. D. O'Neil.)

"Q. Now, Mr. O'Neil, I hand you papers marked for identification, Plaintiff's Exhibits "E", "F", "G" and "H", which are copies of letters, or telegrams, passing between Ohio and the City, relative to this requested shut-down in April or May of 1944, all of them being [110] admitted by the City as having been exchanged.

"Mr. Carothers: Which we admit.

"Q. Will you look at them. I want to simply ask you if you recall those letters and telegrams as subsequent correspondence passing through your office relative to this shut-down?

"A. I think that—as I say, I can't remember each one of them in detail that far back, but we had a certain amount of correspondence, and I agree that this is a copy of one of the telegrams.

"Q. Well then, look and see if there is a letter of the same date, your reply and a further letter to Ohio.

"(Witness examines).

"Q. That is part of the correspondence?

"A. Yes.

"Q. You recall that Ohio did shut down?

"A. Yes.

"Q. This time?           A. Yes.

"Q. And your understanding of it was that they shut down on the terms of your original proposal that——

"They shut down in accordance with the letter that I had written to them setting forth the conditions, you see.

(Deposition of R. D. O'Neil.)

“Q. According to the conditions stated in your letter of March 29th? [111]           A. Yes.

“Q. Of '44, is that right?

“A. Because we specifically stated that this was not to be construed to break the run of the contract, or anything of that kind. I think you will find in this letter that it was called to their attention it was a mutual agreement between these two parties that they wanted to shut down; it was advantageous to the City for them to shut down, and they would be able to resume on thirty days' notice. In other words, that was tantamount to telling them they could have the 6000 again.

“Q. You say that was mutually advantageous and it would not break the run of the contract?

“A. Yes, that is correct. The letter told them the conditions they could shut down. Of course, if they accepted under those conditions, they could shut down.

“Q. Do you recall whether Ohio resumed the taking of the second block of power while you continued as Commissioner of Public Utilities?

“A. I am not positive, but I think it was after I was out of office.

“Q. I think it was in September—no, it was February of '45.

“A. That was after I was out of office.

“Q. That was after your time?           A. Yes.

“Mr. Metzger: I believe that will be all.

(Deposition of R. D. O'Neil.)

Cross-Examination

“By Mr. Carothers:”

Mr. Rybolt: Do you want to read that?

The Court: No, you can go right ahead.

“Q. Mr. O'Neil, the negotiations leading up to the final draft of the contract, as you stated, consumed some two or three months, did it not?

“A. A considerable amount of time. I can't remember the time of Mr. Jones' first visit until we finally signed the thing.

“Q. Now, during the period of negotiations, there were various terms and conditions discussed, things that they wanted that we could not give them? A. Yes.

“Q. And vice versa? A. Yes.

“Q. And the contract, as finally drafted and accepted, was considerably different than many of the terms discussed during the negotiations, was it not? A. Yes.

“Q. As a matter of fact, all through this negotiation, what the City was attempting to do, or what you were attempting to do, was give Ohio a rate and a contract comparable [113] to what Bonneville would do for them, is that not true?

“A. Well, not exactly in those words. You say in the contract that the City could take care of it, keep the new plant in operation, and furnish us a base load to the new plant and still not be financially——

“Q. But, the \$17.50 rate was a Bonneville rate, was it not?



(Deposition of R. D. O'Neil.)

"A. It was. However, I think you remember that under our contract with Bonneville, they could not serve within the City limits.

"Q. Yes. A. Unless we agreed.

"Q. That they might.

"A. That they might come in.

"Q. That is right.

"A. As I say, at that time, it was contemplated the plant would be built and we felt that that load would be an advantageous base load for our new plant.

"Q. All right. Now, all during these negotiations Mr. Kent was superintendent?

"A. Yes.

"Q. And he took just as active a part in the negotiations as you did.

"A. He did. We talked across the table and sat together on most of the meetings.

"Q. As a matter of fact, the final draft of this contract [114] was made after many consultations between you and Mr. Kent and Mr. Jones?

"A. Yes.

"Q. Our Mr. Jones.

"A. Well, no, I don't know about that. I would not say that he had too much to do in it, but, of course, the final draft was after all of our discussions with the representative of the Ferro-Alloys Company. It was the consensus of thoughts together.

"Q. Including the thoughts of Mr. Kent?

"A. Yes. I don't know about Mr. Jones. I

(Deposition of R. D. O'Neil.)

don't think he did too much in the thing. I think Mr. Kent and I did most of the work on it.

“Q. You are referring to our Mr. Jones?”

“A. Yes.

“Q. Well now, this conversation that you had, or the conversation you had with the representatives of the Ohio people regarding the conditions under which the second block of power would be furnished, took place before the final draft of the contract? A. Oh, yes.

“Q. The contract as executed expressly provides that if the City saw fit to allow the company to come back on with the second block of power after once having dropped it, that the power would be furnished on a firm power basis? [115]

“Mr. Metzger: Object to that question.”

Mr. Rybolt: And then Mr. Carothers withdrew it. Then the next question by Mr. Carothers—

“Q. You have stated that it was your understanding that if the Ohio dropped their second block of power after having taken it on once, that then there would be negotiations as to how it would be taken back on, is that right?

“A. Not necessarily negotiations, but I said the City would have the sole decision as to whether—as to what conditions would exist when they took it on again. In other words, if they did not raise any points, it would go under the terms of the old contract. If they wanted to raise any points, they had a perfect right to.

(Deposition of R. D. O'Neil.)

“Q. Well, is there anything in the contract to that effect?

“A. No, because that was a matter of conditions that might come up at the time that you go to take it on again.

“Q. Yet, that was your understanding before the final draft of the contract, is that right?

“A. That the City would have the sole decision.

“Q. Yes, but you did not put anything like that in the contract?

“A. I think it is mentioned in the contract that we have the sole decision, isn't it?

“Q. The contract provides that it is to be within the discretion of the City as to whether or not they shall go [116] back on.

“A. Maybe I said it in different words.

“Q. All right, but there is nothing in the contract, is there, that says that there would be any negotiations or states an agreement as to the conditions under which the second furnace would operate?

“Mr. Metzger: I will call your attention to the provisions of the contract, Mr. Carothers, which, in that very connection says, ‘If and when the City—if and when the Corporation and the City later mutually agrees, that the City will again deliver to the Corporation.’

“Mr. Carothers: I am not raising that question.

“Mr. Metzger: That is exactly the question you are asking about.

(Deposition of R. D. O'Neil.)

“Mr. Carothers: No. If I understand Mr. O'Neil's testimony on direct, it was that if the City saw fit to take them back on, that they could enter into side agreements, or as to the conditions under which the second furnace would operate once back on.

“Mr. Metzger: That is what the contract says.

“Mr. Carothers: No.

“Mr. Metzger: The contract says if they later mutually agree. [117]

“The Witness: At least I thought of the thing, anyhow, whether that was stipulated there or not.

“Q. The word ‘surplus power’ is used in this contract, and was used in your discussion with the representatives of Ohio leading up to the drafting of the contract, is that true?

“A. I don't recollect. I have not read it since we were first negotiating, so I can't repeat the words. It may or may not appear as surplus power in there.

“Q. All right. Now, the contract provides in Section 10, second paragraph of sub-section ‘A,’ that ‘In the event the Corporation elects to exercise its right of alteration, as provided for in this contract, and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City's judgment, surplus power is available in sufficient quantity to meet the Corporation's additional requirements. If and

(Deposition of R. D. O'Neil.)

when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, to be altered downward only by the Corporation, upon at least one (1) month's written notice to the City."

"Now then, it was your understanding that if the City put the Corporation back on with its second block of power, that it would be on a firm power basis?

"A. In other words, we were obligated to serve it.

"Q. Yes, for the duration of the contract if they saw fit to stay on, isn't that true?

"A. Except as under the provisions we have for interrupting certain circumstances.

"Q. Yes. All right. Then, the surplus power that you had in mind was surplus firm power?

"A. Yes.

"Q. That you could furnish twelve months out of the year for the rest of the contract as long as they used it, isn't that true?

"A. As a base load we would have to pass it for.

"Q. Now, in the ordinary use of the words 'surplus power', that isn't surplus power, is it?

"A. Well, that would then be a question whether it is surplus or not. It depends upon your demands. In other words, if we built a plant and we got a sufficient block that might extend over a period, then, we might have surplus power for the full length of time of contract.

(Deposition of R. D. O'Neil.)

“Q. Yes, but that would be surplus firm power, would it not?

“A. Well, it would be power you can supply twenty-four hours [119] a day. It would be firm power you could supply to other people under firm conditions.

“Q. Yes. Well, isn't it a fact that surplus power is power which you have to furnish beyond your firm contract demands?

“A. Strictly speaking, that is surplus power. And, we have dump power.

“Q. What is that?

“A. Surplus dump power is something we supply that we cannot use any place else, and we dump is out. We call it dump power. But, we may have surplus firm power as long as it is not signed up in contractual relations. When it is all signed up in contractual relations, then we have no more firm power.”

Mr. Rybolt: That apparently should be “no more surplus power.”

Mr. Metzger: Either that or no more firm power to sell, I don't care—either one.

“Q. Now you say that it was your understanding that the company was only obligated to operate the second furnace for a twelve months' period. Is that the first and the initial period?

“A. Initial period, yes.

“Q. Section 4, B-3, provides, ‘The additional 6000 kilowatts, if and when used for the second furnace as referred [120] to elsewhere in this contract



(Deposition of R. D. O'Neil.)

shall be at the rate of seventeen and one-half dollars (\$17.50) net per year per kilowatt of billing demand, as in (2) above, except that the continuous and uninterrupted part year operations immediately following a full years' billing at the specified rate, shall be prorated.'

"Now, isn't it your interpretation of that that if the second furnace is operated, that it must be operated for twelve months?

"A. No, for this reason. You say for the first year it was twelve months?

"Q. Yes.

"A. After that time if we put that in they would have to operate a year. We would not obligate ourselves to have to agree to a year at that time when we mutually agreed again, where otherwise we could agree to only furnish them for six months.

"Q. Well now, will you take the contract and point out any provisions that you can make that states, or from which you can gain an inference, that if the City allowed the Company to resume taking of the second block, that they could shut them off?           A. No.

"Q. At any time? Is there such a provision in here?

"A. No, but there is this provision: 'That if the second time [121] we said, 'You can only use it for nine months', that is all they could use it for, would be the nine months.

"Q. Well, find that provision, will you? Do you know of such a provision?



(Deposition of R. D. O'Neil.)

“A. It is the provision you mutually agreed to the condition. That covers it, I believe.

“Q. I wish to withdraw the question and I will ask this question: Will you point out in this contract a provision under which the City will be permitted to discontinue furnishing power for the second block?

“A. I haven't pointed it out.

“Q. In the absence of any special agreement with the Corporation that the City would have a right to discontinue——

“A. No, I haven't. I said there are provisions there for interruption on certain conditions that were covered in the contract, but there is no other provision for discontinuance.

“Q. In other words, if we pulled them back on, we had them, is that right?      A. Absolutely.

“Q. We could not stop?      A. No.

“Q. And on a firm power basis?

“A. Absolutely. No one ever made a statement that we could [122] discontinue, but we could refuse to start the furnace, and——

“Q. Well——

“Mr. Rybolt: Let the witness finish the answer.

“A. (Continuing) We can also take the record according to our mutual agreement. We can put in any stipulation that is mutually agreed by both parties. I think that covers it.

“Q. Well, going back to Section 4, sub-section b-3. This particular section says that in substance again, where we put the second furnace back on,

(Deposition of R. D. O'Neil.)

'That the continuous and uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be prorated.'

"Mr. Metzger: I object to that question as to the form because it purports to state language of the contract, and does so erroneously. It is an improper question.

"Mr. Carothers: Withdraw the question.

"Q. I hand you a contract and ask you to read sub-section b-3."

Mr. Metzger: After reading it, the witness said:

"A. Well, it say exactly what I have tried to tell you here [123] following the full year's operation. They had the full year's operation on it as I understand. Consequently then, any part years would be billed at the part year rate. Now, if this is allowable in the record, we discontinued the operation by mutual consent because it was advantageous to both parties, and I would not consider that interruption, because it was agreed to by both parties. We agreed beforehand, they could come back on with thirty days' notice.

"Q. Well, this does state that——

"Mr. Metzger: We will admit it states what it states.

"Q. Now, your interpretation of that is that if they did not operate the furnace a full year, they would have to pay for a full year's operation nevertheless?

"A. In the first initial year, yes.

"Q. All right. Now, this conversation that you

(Deposition of R. D. O'Neil.)

had on a number of occasions you say with representatives prior to the drafting of this final contract, wherein you say that this twelve months' compulsory period only applied to the initial period, why did you not clarify that point during—in drafting this particular section?

“Mr. Metzger: Object to the form of the question as argumentative and improper.

“Q. (By Mr. Carothers): The contract speaks for itself, isn't [124] that true?

“A. The contract speaks for itself. We drew it up and when it was satisfactory to both parties, the City Council approved it. It was drawn up to the best of my ability at the time it was drawn up.

“Q. Well now, this interruption in the spring of 1944 took place for the reasons and in accordance with the correspondence?           A. Yes.

“Q. As stated, for the reasons and in accordance with the statements contained in the correspondence, is that true?

“A. Well, not altogether, because I think that we disagreed with their contentions in our letter to them, but we agreed that the interruption should take place because of conditions that affected us also.

“Q. Well, that is so stated in the letter?

“A. I say, we stated that in our letter to them, of course.

“Q. Yes.

“A. But, we did not agree to their interpretation of that.

(Deposition of R. D. O'Neil.)

“Q. Well now, your letter of March 29th, I believe it was, stating those conditions, contains no statement that this interruption, or temporary suspension, would not be considered as an interruption of the contract, does it?

“A. It does not state so——” [125]

The Court: How many more pages are there?

Mr. Metzger: If your Honor please, I'm on page thirty-eight, and it includes page forty-four. Seven pages.

The Court: I think we'll hurry along and finish it.

“A. It does not state so, but we said in the letter, if I remember right, we would give them the right to resume the use of current on thirty days' notice, and there was purported to be no consideration to the interruption, so just on ordinary common thinking, I would say——

“Q. Just a moment.

“Mr. Metzger: Let the witness answer the question.

“Mr. Carothers: We don't want common thinking. If there is any understanding to that effect, all right, but I object to that kind of an answer.

“A. There was no understanding to any effect except that that would be my interpretation, that when the agreement was made, that when they resumed operation, it would be just the same as they would run right on through, except they would not pay for that time. It was mutually agreed the Company could drop their load without the City's con-

(Deposition of R. D. O'Neil.)

sent, according to the contract. Then, it would be a cessation of that second block entirely. But, this [126] was mutually agreed to before they dropped the load.

“Q. Well, in accordance with the correspondence?

“A. Yes, and under the terms of the contract.

“Q. Yes. And, there was not any other understanding? A. No.

“Q. As a matter of fact, there were not any oral conversations about this except perhaps with the local man, is that right?

“A. I think most of it was done by letters, and probably all the discussions that took place about the second block were between Mr. Kent and myself.

“Q. So, you did not have any understanding with the Company other than what is stated in these letters? A. That is right.

“Q. Your letter stating that there might be a temporary suspension in the spring of 1945 was written after consultation——”

Mr. Rybolt: It should be '44, I believe.

“——was written after consultation with Mr. Kent and Mr. Boyle, in our office, isn't that right?

“A. You mean the temporary suspension in 1944?

“Q. '44, yes.

“A. I believe that we consulted pretty freely with you people on pretty nearly all occasions on these things. I don't remember this particular con-

(Deposition of R. D. O'Neil.)

versation, but I know that [127] with anything that was a matter of legality, or a matter of more heads than one thinking about it, why we consulted with Mr. Boyle and yourself quite often.

“Q. Well, I was particularly interested to know if Mr. Kent was thoroughly familiar with it?

“A. Mr. Kent was thoroughly familiar with it.

“Q. I think he wrote the letter, didn't he? (Mr. Carothers examined the exhibit). You made some reference that your interpretation of the contract requiring them to carry the second block for a period of twelve months, was based on the fact that it was necessary for the City to expend money to serve. A. Yes.

“Q. To prepare to serve them? A. Yes.

“Q. If they were permitted to come back on with the second block after having dropped it, you would be under the necessity of providing the necessary energy to serve the second block as long as they cared to have it?

“A. However, we had reserved the right in the contract to not supply it if we considered it not advisable.

“Q. I say, if you permitted them to come back on?

“A. Well, in normal conditions we would say if we permitted them to come back, it would be an admission on our part that we had the necessary available current for them, [128] therefore, there would be no expense of installation but only energizing the transformers, which would be fusing them, which would be a very nominal expenditure.



(Deposition of R. D. O'Neil.)

“Q. But, in spite of the fact that the contract says that, if you did permit them to come back on, it would be on a firm power basis? A. Yes.

“Q. You would then have a block of 6000 kilowatts tied up that you could not contract away under any firm contract to anybody else?

“A. Yes, but before we would allow them to come back, we would determine those factors before we would say, yes, to come back on again.

“Q. I understand that, but having put them on, you had a firm power commitment?

“A. Yes, the same as the firm power commitment in the first instance.

“Mr. Carothers: I think that is all.”

Mr. Rybolt: Then there is redirect examination by Mr. Metzger.

### Redirect Examination

By Mr. Metzger:

“Q. Now, as a matter of fact, in the writing up of this contract, after your conversations with Mr. Weitzenkorn, [129] and Mr. R. R. Jones representing Ohio, there were no changes from the agreements reached with those representatives of Ohio, were there?

“A. When we made the final proposition which was presented to the Council, there were no changes after that time.

“Q. I mean, there were no changes in drawing that up; you embodied in that contract the agreements you had reached in your negotiations with Mr. Weitzenkorn and Mr. Jones?



(Deposition of R. D. O'Neil.)

"A. The copies of the contract were written up at different times and submitted, and we finally got one that was satisfactory that was presented. That was the concensus of what we had agreed to across the table.

"Q. In other words, the contract that was written up, and signed, embodied the agreement you had reached? A. Yes.

"Q. And Mr. Kent did not find it necessary to make any changes?

"A. Well, all the changes we had made had been in the final submission to those gentlemen.

"Q. They had been agreed to by them in advance?

"A. I don't see how we could have done it any other way.

"Q. That is what I am getting at. Now, as you stated, when you negotiated this contract, and when you entered into it, you were attempting to, by this contract, to establish [130] a base load for the new Nisqually Plant?

"A. That was the discussion we had on that matter, and we felt it would be a good base.

"Q. A good base load for that plant?

"A. Yes.

"Q. And, at that time you figured when that plant came into operation you would have a surplus power over and above the City's firm commitments?

"A. Over and above the normal commitments. This would be a firm commitment also, and it was,

(Deposition of R. D. O'Neil.)

but we would have over and above that amount of power necessary to supply our other obligations, you see.

“Q. That is right. Now, speaking again and just very briefly about this 1944 shut-down, as I understand your statement and the correspondence, Ohio was contending that they had a right to shut down for causes beyond their control and you did not agree to that?           A. No.

“Q. You specified the conditions under which you would agree to a shut-down?

“A. I believe that is so.

“Q. And the shut-down was made under the conditions which you have outlined?

“A. That is right.

“Q. Which was a mutual agreement deemed to be advantageous [131] to both parties?

“A. That neither side should be penalized.

“Q. Neither side should be in any way penalized?           A. Yes.

Mr. Metzger: That is all.”

#### Recross-Examination

By Mr. Carothers:

“Q. Mr. Jones and Mr. Weitzenkorn were the first people who approached you about negotiating a contract?

“A. Mr. Jones came first. He came out first and talked about it. Then, I believe he made a second trip. I think about the third trip Mr. Weit-

(Deposition of R. D. O'Neil.)

zenkorn was with him. I am trying to think back. I know Mr. Jones came out here first and we talked over this situation.

“Q. But you don't recall when the conversation took place wherein you discussed the conditions surrounding the operation of this second furnace?

“A. I think that was a part of the discussion from—I don't think Mr. Jones mentioned that, but after we got into drawing up the contract, I think it came up. I don't recall exactly how, but I believe that they contemplated the second furnace right from the start of our final negotiations on the contract. I know this much, that Mr. Jones sent a letter back, and I think you sent a [132] letter back, and in your letter it was many blocks of 6000, and I said one block. I think you will find that back in the correspondence.

“Mr. Carothers: I think that is all.”

(Witness excused.)

Mr. Metzger: Now, if your Honor please, we offer identification A to H attached to the deposition.

The Court: They'll be submitted. Do they—I think they had better be taken off of the—and marked with appropriate numbers here that conform with marking such property.

Do these exhibits include the correspondence between the parties?

Mr. Metzger: Yes. Exhibit A is a copy of the contract. This is Exhibit A.

The Court: Oh, well, that—we have it—I mean when this suspension now——

Mr. Metzger: Yes. Exhibit B is a letter from Mr. O'Neil to Mr. Weitzenkorn in October of 1941, interpreting the contract in evidence on various points but particularly regarding this twelve months payment.

And, Exhibits C to H are correspondence of witnesses of the suspension in '44. The request for [133] suspension because of the War Production Board's orders, Mr. O'Neil's reply stating that they didn't agree to that, and laying down conditions under which they would talk.

Mr. Carothers: The charges are that those last four, the contract—but the others it is the defendant's desire that they be made as exhibits.

The Court: How many more witnesses do you have, Mr. Metzger?

Mr. Metzger: I have one—two—three.

The Court: How many witnesses will you have, Mr. Carothers?

Mr. Carothers: I'll have about four or five, I think.

The Court: It's very evident, of course, we can't finish this case today. Tomorrow morning the jury is reporting in here to try a short criminal case and I feel that I shall have to suspend this case for the purpose of disposing of that jury case. My calendar is very full for next week.

Will you—may I see the Clerk's docket. I didn't bring mine.

Mr. Metzger, you have here a case on Tuesday.

Mr. Metzger: Yes, your Honor. Now from my point of view, that adds confusion to the confusion [134] already existing. That's merely an argument. It was specially set and counsel is coming from San Francisco. They called me yesterday and they plan to arrive here Sunday for discussions with me. Well, I can't go on with this case and discuss the other case with other counsel.

The Court: Well, I—I—you'll be able to get in touch with them to stop them. I shall vacate the setting of it on my own motion. The Clerk will be directed to notify attorneys for the plaintiff, because I can't possibly hear it, from the state of my calendar at this time, and it can either be re-set on application or the Court can re-set it. It will have to be set sometime in May.

Mr. Metzger: That would be—I know that plaintiff's attorneys in that case will be disappointed to say the least, if it has to go over that far. You're speaking now, I take it, of the Longview Fibre Company matter which was set for Tuesday, next?

The Court: P. U. D. versus——

Mr. Metzger: Yes. Longview Fibre.

The Court: Longview Fibre Company.

Mr. Metzger: Yes.

The Court: Well, P. U. D. is the plaintiff.

Mr. Metzger: Yes.

The Court: I think I shall have to re-set [135] that to—to take its place on the regular law calendar and the parties could argue it then.

Mr. Metzger: Well, we both request additional time to argue it, your Honor. Counsel expects to come from San Francisco to participate in the argument.

The Court: Due to that fact I shall vacate this setting and re-set it for the 20th of May. And this case—I don't think I'll work on it any further today because we didn't have any intermission, but continuously worked for two hours and fifteen minutes. I think it will have to go over until Tuesday, but I'd want it to be finished, if it possibly could, on that day. You ought to complete it——

Mr. Metzger: I think, your Honor, we can.

Mr. Carothers: Well, the docket is clear for us Tuesday morning, is that correct?

The Court: There is a habeas corpus case, but it shouldn't take a great while. It may be 10:30 before we can take this matter up, Tuesday.

Mr. Metzger: Well, it's recessed until ten o'clock with the provision that we may be a little while after that getting on, is that my understanding?

The Court: Yes, I think we'll continue until say 10:15 on Tuesday morning.

Mr. Carothers: Just before the Court recesses [136] the witness for the plaintiff testified regarding the fact that he's—was familiar with this recording record that was made on—the record needed at the plant. We think that it's only fair and we ask the Court to require the plaintiff to make avail-

able that chart for inspection by the representatives of the City between now and Tuesday. He's testified that he's——

The Court: Oh, I think that should be done. I don't know whether there's any objection—not the whole chart over all this period of years, but just for the months that are involved.

Mr. Carothers: From September to February 26th—September——

The Court: Yes.

Mr. Carothers: February 26th.

Mr. Rybolt: I believe, your Honor, that the witness said that that was in Canton. Now, we'll do our best to get it here by that time, but I'm——

The Court: Well, I understood him to say that it was here.

Mr. Metzger: Well, now it develops that—upon inquiry now, I think it is in Canton. We'll try to get it here just as fast as we can.

The Court: Well, I don't think—I don't want to take the time to have it brought in here, but [137] some City—some—one of the City officials may examine it for the sole purpose of ascertaining if you went over the 6500 during these months involved. I assume that's the one.

The Court will be at recess until ten o'clock tomorrow morning.

(Whereupon adjournment was taken on this case until 10:15 a.m., April 29.) [138]



April 29, 1947—10:15 A.M.

The Court met pursuant to adjournment; all parties present.

WILLIAM PRITZ

resumed the stand for further examination, and testified as follows:

Direct Examination

By Mr. Metzger:

Q. Mr. Pritz, to pick up—I think you testified, but in any event, what is the fact. Following November 24, 1945, did you do anything about setting the company's demand limiter?

A. Well, after the 24th of November, why I proceeded to have our demand limiter adjusted for the operation of one furnace. That would be to operate on the original block——

Mr. Metzger: A little bit louder, please.

A. ——That would be to operate on the original block of 6500 kws.

The Court: That was what date, Mr.——

The Witness: That would be after November 24th.

Q. How soon after that? [139]

A. Well, at midnight.

Q. At midnight on what date?

A. Starting the 25th.

Q. Starting the 25th. That demand limiter remained set at that point since that time. Now following—going right along in that—with the demand limiter set that way, and if it was in work-

(Testimony of William Pritz.)

ing order, what was the fact as to whether or not your operations could impose a demand in excess of 6500 kilowatts?

A. I didn't get that question.

Q. I say, assuming your demand limiter is in good working order and operating and set—that you set it at midnight on December 24, 1945. Could the plant operations impose a demand in excess of 6500 kilowatts? A. No, it could not.

Q. It could not. Now, Mr. Pritz, after November 24th, or—strike that. What was your practice—what did you do about—if anything, about inspecting or comparing the readings of the company's demand meters and the City's demand meter?

A. Well, it was my practice daily, and several times during the interim of the day to look at the City demand meter and also check ours, but, of course, I was probably interested in the reading of the City's demand meter because that was the billing demand. [140]

Q. That's right. Now, when, following November 24th, did you discover anything seemingly out of the way in connection with the City's demand meter?

A. Well, I found nothing wrong until the 31st of December.

Q. What did you discover that day?

A. I found that on inspection—I arrived at the plant at 7:30 in the morning, and it was the custom as I'd pass on to the furnaces, I'd pass through

(Testimony of William Pritz.)

the building where the demand meter was stationed—was located, and upon observing the meter I noticed that a demand of 7500 had been attained.

Q. What did you do about it?

A. Well, I contacted the City and asked that they send some of their qualified men down to inspect the meter.

Q. Who did you talk to, if you recall?

A. I believe I talked to—on the 31st I believe I talked to either Mr. Thomas or Mr. Jones. I am not quite certain.

Q. Mr. Jones is a man in the court room here now?

A. Yes, sir.

Q. Sitting on the right side of the court room as you are facing. What did you say about the situation?

A. Well, I told Mr. Jones that I felt something was in error with their meter, that I was on a one-furnace operation and felt that I wouldn't be pulling a load [141] that would indicate a 7500 demand, so during the day after our conversation, the City Meter Department sent their representatives down to check their meter.

Q. Well, now before we get down to the representatives, did Mr. Jones say anything in response to your statement to the effect that the plant's operation was a one-furnace operation, and you couldn't therefore have a demand in excess of 6500?

Mr. Carothers: Just a minute, we object to that.

Q. Well, all right. In response to your state-

(Testimony of William Pritz.)

ment that you were on a one-furnace operation, did Mr. Jones say anything about—reply to that?

A. He merely stated that we were paying for 12,500 and he didn't seem concerned that the demand was at 7500, and he felt that I should not be too worried about it.

Q. Did he—to refresh your recollection, did he or did he not say anything to the effect that the City knew that you were on a one-furnace operation, but it didn't make any difference because, we're going to be billed for a demand of 12,500 anyway?

Mr. Carothers: I object to the question.

The Court: The question is quite leading, but I think I'll let him answer the question.

A. To the best of my knowledge, he merely stated that I was [142] paying for 12,500.

Q. I see. All right. Now, in response to your telephone conversation with him, did any representatives from the City come down?

A. On the 31st of December Mr. Avril and Mr. Parker, City meter men, came down to inspect their meter—test it.

Q. Did you see them and talk to them?

A. Yes, I did.

Q. Did you have any conversation with them concerning the character or magnitude of the company's operations?

A. Well, I merely stated that I was on a one-furnace operation and didn't believe that I could pull a 7500 load demand.

(Testimony of William Pritz.)

Q. Now, Mr. Pritz, following that day, did any similar event or events take place shortly thereafter?

A. Well, on the—New Year's Day, the first of January, why the demand again went up.

Q. What time of the day?

A. Well, I ascertained it went up between the hours of 4:30 p.m. and 7:30 p.m. on New Year's Day.

Q. How do you fix that time?

A. Well, at 4:30 p.m. I checked the City demand meter before I left the plant; went home and had my evening meal and as customary came down to the plant in the evening. I got [143] there around 7:30 and passed through the building again. When I checked the meter I noticed the demand was at 7500 again.

Q. What was—were you on a one-furnace operation at that time?

A. I was on a one-furnace operation.

Q. And you had been since the 24th of November, is that correct?      A. Yes.

Q. What did you do about this City meter's reading at that time, on the 1st of January?

A. Well, I contacted the City on the 2nd or the 3rd of January, and they sent their meter men down again to check their meter.

Q. Do you recall who you talked to at the City at that time?

A. Off hand I don't know who I talked to. Either talked to—the only two fellows I've ever talked to

(Testimony of William Pritz.)

is Mr. Thomas or Mr. Jones. It would have to be either one or the other.

Q. Who is Mr. Thomas?

A. Well, he's one of the foremen. I believe, on the line—tower lines. He handles these sub-stations.

Mr. Metzger: For the record will it be admitted that Mr. Thomas is in charge of the City's Tide-flat Substation—is that the right answer? [144]

A. Well, that's who I usually call when we're in trouble, when we want to know anything. I know him better than the other men in the City line—

Q. I see. What did you say at that time?

A. Well, I just told him that the—their meter registered a demand exceeding 6500.

Q. Did you repeat any statement to the effect—relating to the magnitude of the company's operations?

A. Well, I merely stated that their meter registered a 7500 demand and that I questioned it, and asked that they send a——

Q. Did you tell them why you questioned it?

A. My own personal belief was that I didn't think I was capable of pulling that much.

Q. I see, but did you communicate that to Mr. Thomas, or whoever you talked to? I know what your belief is, but——

The Court: Evidently the witness hasn't a very clear recollection of the matter.

Mr. Metzger: All right. That's all.

(Testimony of William Pritz.)

Cross-Examination

By Mr. Carothers:

Q. Mr. Pritz, you perhaps testified on—last Thursday, but I do not recall, how long had this demand limiter device [145] been in operation?

A. Our demand limiter?

Q. Yes.

A. Well, it had been in operation ever since we went on the demand back in '42, I believe. Whenever it was necessary that we attain a demand limit, that's when the limiter was in use.

Q. Is the same demand limiter there now that was put on in '42?           A. Yes, sir.

Q. Your initials are W. W. Pritz?

A. That's right.

Q. You were superintendent of the plant on the 8th day of July, 1944, were you not? Do you recall on that date writing a letter to the City of Tacoma, Department of Public Utilities, in which you discussed the trouble you were having with the demand limiter and in which letter you stated: "We wish to advise also that we are planning to purchase immediately a more suitable demand limiting device and will in the future endeavor to manually watch our input rather than depend solely on the demand limiter?           A. Yes, sir; I wrote that.

Q. And you never—you never changed—you never got a new demand limiter, did you?

A. Yes, sir, we got a Westinghouse demand limiter which is [146] in use at the present time.



(Testimony of William Pritz.)

Q. Well, I thought you just testified that you had the same one that you put on in '42?

A. Well, at that time—at the time that you're talking about, that GM 11 was in action. At the present time it is not.

Q. As a matter of fact, you had trouble with a lot of your equipment over there, with meters and demand limiter and your chart meter. All of them. You were continually calling the City about it, were you not?

A. I called the City at times to verify and check.

Q. You had the City work on them from time to time, did you not?

A. They worked on the furnace totalizing meters. At any time, I don't believe they took the demand limiting devices out of the plant to work on them. I've had them come up and check with me against the City demand meter to see that they're running right, and synchronization.

Q. Mr. Pritz, you know, as a matter of fact, the outcome to all these visits that our meter men had, and the inspectors made over to your plant, they never found the City's meter out of proper operation. When the meter was tested—when it was taken out it was—they reported to you it was correct, did they not? [147]

A. That's correct.

Q. When was the Westinghouse demand limiter installed, if you know?

A. In its original form, or its original installation, it was installed as merely a recording device

(Testimony of William Pritz.)

—a graph chart, as it were. After this controversy, I believe in March of '46, it was hooked up so that it became a—a demand limiter in effect the same as the original demand limiter that we had, GM 11.

Q. Then this General Electric demand meter that you refer to in your July 8th, 1944, letter was in operation until March, '46, is that right?

A. It was in operation at the time this—this question that we're talking about.

Q. Now this—this particular chart meter is right out in the open exposed to dust. It wasn't enclosed in a glass case or protected, was it?

A. Which meter are you referring to?

Q. I'm speaking of the one that—the meter that—the recording meter?

A. The Westinghouse, you mean?

Q. Yes.

A. Well, it's in our substation and it's enclosed in a glass case. I guess it's as clean as possibly meters of that type can be kept clean. [148]

Q. So you are assuming that because our meter showed a demand beyond 6500 it was wrong. Is that your only reason for assuming it was wrong?

A. I make the statement that we wouldn't be able to pull 7500 demand. I don't know whether the meter—your meter was wrong or was correct.

Q. Well, as a matter of fact, you know that you can exceed the 6500 by a considerable number of kilowatts on one furnace, can you not?

(Testimony of William Pritz.)

A. Yes, you could exceed it a few kws., but I—I dare—I feel that you couldn't pull 7500 without injuring your transformer to the extent that it would possibly blow up or short out.

Q. Well, you had sufficient transformer capacity there for 12,500, did you not?

A. The City had that, but one transformer such as we have is incapable of pulling 12,500.

Q. What is the capacity of your transformer?

A. Our transformers are 6000 kva.

Q. Well, as a matter of fact, you know that that could be exceeded by 25 or 30 or 40 per cent, do you not?

A. I do know that, but if you were pulling 7500 kw. your kva. would be way overrated.

Mr. Carothers: I think that's all.

The Court: What do you mean by this demand [149] limiter? That you could just take that much energy into your plant and then it would—the energy would cease to flow if you went above that?

A. The energy would be cut off from going into the furnace transformer. We operate on a one-half hour demand period.

The Court: Well, when you set this device at 6500 kws., how would it get to 7500?

A. The only way that it could exceed the setting at which we had it set would be for the furnace to pull a load of power exceeding that.

The Court: Well, but I thought that limit—it would just automatically shut off the furnace.

(Testimony of William Pritz.)

A. The limiter if functioning correctly should shut the furnace off and it was our endeavor at all times through our own men and men with professional services——

The Court: Well, I'm not so much concerned now with your endeavor, I just want to find out something about how this apparatus worked. It could be set at 6500, but then it might automatically go on to a higher figure?

A. If it wasn't functioning it would let the power go on, yes, sir.

The Court: And it did actually go on as far as you know. In January it was showing 7500? [150]  
1—OHIO (folo Metheny) 10/18 hochwalt

A. The City demand meter registered 7500. Our limiter would not show—it merely kicked the furnace off, it had no chart or any way——

The Court: Well, did you have any experience of having the furnace kicked off in December or January?

A. Yes, the furnace would be kicked off several times during the day if we came up to the 6500. We had the limiter set at 6384 and when the demand—the average demand for that period would come up to 6384, the furnace should be kicked off as that's where the setting was set for.

The Court: But at no time you say after November the 24th did you have the second furnace on?

A. No sir, we were on one-furnace operation.

The Court: Have you had it on since?

A. We have——

(Testimony of William Pritz.)

The Court: You are still operating on the one furnace basis.

A. One furnace operation.

The Court: And if you consumed more than 6500 kw's in January or December, it was because the one unit was using it?

A. If that were the case it would be that one—one would have done it, yes sir.

The Court: Well then you were to pay for that excess on—a rate independent of the second furnace? [151]

A. I believe that's correct.

The Court: That question perhaps isn't a question that's appropriate to you.

That's all.

Mr. Carothers: Mr. Pritz.

The Witness: Yes sir.

### Cross-Examination

By Mr. Carothers:

Q. Section three (b) of the contract with Ohio provided that: "The City shall install sufficient capacity in its transformers, switches and lines, so that power inputs of 7500 kilowatts may be taken by the Corporation without injury to the City's facilities." Now that refers to the initial delivery of one furnace.

Mr. Metzger: Just a minute, if Your Honor please, I don't think this is proper cross-examination. This witness—hasn't—

(Testimony of William Pritz.)

The Court: It might have been provoked by the question the Court asked, but I don't know whether this witness is——

Mr. Metzger: He hasn't professed to testify as to the contract terms.

Mr. Carothers: I withdraw the question. That's all. [152]

The Court: That's all, Mr. Pritz.

Mr. Metzger: Well, just one more question if Your Honor, please.

Redirect Examination

By Mr. Metzger:

Q. Now, Mr. Pritz, in view of the first question, I show you a sheet of paper that's marked for identification Plaintiff's Exhibit 3. I think you identified that as the section of the chart made by the Westinghouse Recording Demand meter covering a period from—sometime early in the morning of December 31st to the end of January 1st or perhaps into January 2nd. Is that correct?

A. Yes sir.

Q. That covers then the period when you observed the City's recording—or City's demand meter to register a demand in excess of 6500?

A. Yes.

Q. This graph records the demand from the same side of the transformers as the City's demand meter? A. Yes.

Q. Does it show any demand in excess of 6500 during that period? A. No sir, it doesn't.

(Testimony of William Pritz.)

Q. Does it show any indication that it was not recording demands during all of that period, every half hour?

A. It was recording demands all except the time that the furnace would be down then it ceased to record.

Q. All the time the furnace was in operation, it was recording demands? A. Yes sir.

Mr. Metzger: We now offer this chart in evidence.

Mr. Carothers: No objection.

The Court: It will be admitted.

(Whereupon the chart referred to above was admitted in evidence as Plaintiff's Exhibit 3.)

Mr. Metzger: That's all, Mr. Pritz.

Mr. Carothers: Just one question on this chart.

#### Recross-Examination

By Mr. Carothers:

Q. That is a section torn out of a roll 25 to 30 or 40 feet long. is it not—the section of the chart?

A. Yes sir.

Q. Just covered two days. One day and—two or three days? A. Three days.

Mr. Carothers: That's all. [154]

(Witness excused.)

Mr. Metzger: Call Mr. Farmer.



MARVIN FARMER

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, please?

A. Marvin Farmer.

Q. Beg pardon, I didn't get it?

A. Marvin Farmer.

Q. Marvin Farmer? A. Yes sir.

Q. Where do you live, Mr. Farmer?

A. In Philomath, Oregon.

Q. Were you at any time employed by Ohio Ferro-Alloys Corporation in Tacoma?

A. Yes sir, I was employed in '41 and worked until the early part of '43. I was a maintenance man and later maintenance superintendent. Then, on return from the service I was employed by them again starting on the 19th [155] of December 1945.

Q. 19th of December, 1947?

A. At which time I was in Canton, and reported out here, the first day at the plant was the 27th.

Q. 27th day of December, 1945?

A. Yes sir.

Q. In general, what were your duties? Did you have anything—in other words, did you have anything to do with the meters—electrical meters affecting the current, the taking of current—taking of energy, from the City?

(Testimony of Marvin Farmer.)

A. Well, at the time I returned, I was trained to fill in as Plant Superintendent and at that time we had a new maintenance man and it was my duties to—that is a maintenance superintendent, and it was my duties to assist him and line him out on his duties, in which case I had a great deal to do with.

Q. Well, going to the 27th of December—from then on, did you have occasion, or was it in line of your duty and did you examine, daily or periodically, the readings of the various meters that were installed at the plant?

A. Yes, as Mr. Pritz laid out to me, that was one very important duty and I carried it out to the best of my ability of checking several times a day on each one of the meters.

Q. Well, on December thirty—27th, 1941—forty—excuse me— [156] four o'clock, I beg your pardon, what maximum demand was registered on the City's meter?

A. Well, as near as I could figure, it was about 6350.

Q. 6350?

A. And, at that time, why Mr. Fudge and I figured it together.

Q. Who is Mr. Fudge?

A. Mr. Fudge is G. E.—General Electric Service Engineer.

Q. Service engineer?                      A. Yes sir.

Q. From the General Electric Company?

A. Yes sir.

(Testimony of Marvin Farmer.)

Q. What was he doing in the plant?

A. Well, it seemed that Mr. Pritz called him down to make a general check on our recording meter as to synchronism with the power company's meter.

Q. I see. On the—January twenty—or December 27th, 1945, the City's meter recorded 6300, did you say, or——

A. As near as we could figure, it was about 6350.

Q. 6350. Now that meter in its operation, Mr. Farmer, records the highest demand that's been previously imposed, does it not? Since it was last reset?

A. Once a month they would reset that meter.

Q. Yes.

A. Then there was a needle on that meter that would stay [157] fixed.

Q. In other words if they set it on the first of the month or the last day of the month, the next day there was a maximum demand of—of, we'll say 6000 kilowatts, the indicating needle would go up to 6000 kilowatts. Is that correct?

A. That's correct. Any half hour period would place it.

Q. Well then if the next day there was no demand that high, the needle would still stay at 6000?

A. That's correct.

Q. And if the following day there was a little higher demand of 6100, the needle would—the indicating needle would move up to 6100?

A. That's correct.

(Testimony of Marvin Farmer.)

Q. So that—that meter never showed when the demand reached that high point?

A. No, that meter could not record any date, at all.

Q. Just simply said that sometime since it was last re-set, the demand got up this high?

A. That's correct.

Q. Well on December 27th, the City's demand meter was at 6350. That meant that no demand more than that had been imposed, according to that meter during the month of December to that date. Is that correct?

A. That's correct because Mr. Fudge was assisting me in [158] getting familiar with the—Mr. Crites was assisting me in getting familiar with the meters again. It had been several years——

Q. Well, I'm just asking you about the—that's a fact as to this meter? A. Yes.

Q. Did you compare that with the record made by the company's recording—Westinghouse Demand Meter?

A. Yes, it was—the company's meter was right above it and it was just a glance up there, and it was——

Q. Two were on the same panel?

A. Yes, right adjacent.

Q. You could look at one and at the other without moving from where you were standing. Is that right? A. Yes.

Q. And the—what was the practice compared

(Testimony of Marvin Farmer.)

with—between the City's meter and the company meter at that time?

A. You mean in the——

Q. Did they show the same demand? Approximately?

A. Well, they were very close, as best we could tell. That needle on the power company's meter was so fine that it's hard to make an accurate check on it, but——

Q. When you say the power company, you mean the City, is that right?                   A. Yes sir.

Q. Now, following December 27th, when did you notice anything that seemed to you out of the way with either of them, if anything?

A. Well, the morning of the 31st, the meter was—the City meter was way above 6500—indicating way above 6500.

Q. Was there any corresponding increase in demand registered on the company's meter?

A. No sir.

Q. Mr. Pritz has testified that he called the City and the City representatives came down to the plant on the 31st day of December, 1945.

A. Mr. Avril was in the plant on the 31st, yes.

Q. Did you see him or talk to him?                   A. Yes.

Q. Did you say anything to him regarding this—demand that the City's meter appear to have registered?

A. Well yes, it—with me it was an elimination of error. I wanted to get it straightened out, and I explained to him the situation of one-furnace oper-

(Testimony of Marvin Farmer.)

ation, and the fact that our meter seemed to be—our demand limiter seemed to be working correctly at that time, and that it would be next to impossible to draw that load on one furnace.

Q. Now, as I understand you, you told him that the plant was on one-furnace operation and that it would be, as you say, next to impossible to draw a load the City meter [160] registered?

A. Yes sir.

Q. Did a similar occurrence happen the next day or a day or two thereafter?

A. Well on the 31st it happened.

Q. We've been talking about the 31st, 31st of December.

A. It never happened after the 31st, no.

Q. What about the 1st of January?

A. Now, wait a minute. I recall that statement. It never happened after the 31st with the exception of the first of January that we know about. The first of January it did happen. I get my dates mixed up.

Q. What time did it happen on the first of January?

A. It happened in the evening of the first, between four thirty and—as far as I know, seven thirty. I arrived at the plant at eight and Mr. Pritz called my attention to it.

Q. You observed yourself the City's meter was then registering a demand in excess of 6500?

A. Yes sir.

(Testimony of Marvin Farmer.)

Q. Did you check again the City's recording meter at that time—the company's recording meter?

A. Yes.

Q. Did it show any excessive demand?

A. Well no, it didn't show any excessive demand over 6500. [161]

Q. Did the City's man come down there after—about it?

A. Well, Mr. Pritz, I believe, called them up on the following day and they come down the day following that.

Q. Who came down that time?

A. Mr. Avril, I believe, and there was somebody with him. I believe it was a Mr. Parker.

Q. I see. Now, when they—did you have any conversation with those gentlemen, when they were down there on the 2nd or 3rd of January?

A. Yes sir.

Q. '46. I take it, Mr. Farmer, you were more interested in tracing where the error was, if there was an error..      A. That's true.

Q. Did you have much the same conversation with these people on that occasion as on previous occasions?

A. Yes, the same situation exists, therefore the same conversation existed. It was much the same thing.

Q. In other words, as I understand you, you were saying, "We're on one furnace operation and we can't go on over 6500. Now how did this happen?" Is that right?

A. That is the——



(Testimony of Marvin Farmer.)

Q. That's the gist of it?

A. That is the general——

Q. Topic or trend of the conversation? Is that right?

A. Yes sir. [162]

Mr. Metzger: That's all.

The Court: Well, what I'm interested in is did you find anything that was wrong. Not so much what you said. Whose meter was off. Was that discovered to your knowledge? And if you don't know, just say you don't know.

The Witness: That wasn't discovered.

### Cross Examination

By Mr. Carothers:

Q. Mr. Pritz—or, I mean, Mr. Farmer, the fact remains that any time that the City man came down, that is to various factors, meter readings, and so forth, that they found that the City's meter was correct in all these tests. Isn't that true?

A. They said that it was correct at that time, yes sir.

Q. You found that on the early morning of December 31, 1945, that the City's meter had gone up beyond 6500?

A. Yes sir.

Q. What time was that?

A. Well, I believe I arrived there about,—between seven and seven fifteen and that is the general time I first made the rounds through the plant.

Q. Well, but that meter, any time between the 27th of December which was the first day you were there, and the early morning of the 31st of Decem-

(Testimony of Marvin Farmer.)

ber, could have [163] registered that demand in excess of 6500. Is that not true?

A. That would have been true had I not been looking.

Q. Well,—

A. But I watched it very closely.

Q. Well, but it might have registered that on the night of the 30th of December, might it not?

A. Sometime during the night, after the time I left, it could have, yes.

Q. And, you didn't—your recording meter chart is rolled up in rolls as it passes the recording instrument, isn't it?

A. The company's—that's what all those company meters does, yes.

Q. Yes. So that you couldn't inspect your recording meter to find out when that went up beyond 6500, could you?

A. It's a very simple matter to remove that roll and roll it out. I did that quite extensively.

Q. Well, how can you explain the fact that this particular piece of this chart is torn off at six o'clock in the morning and on the 3rd or 2nd of December. Where's the rest of that chart?

A. I believe that it's at the plant. I have good contact with the company, but I wouldn't know where it was.

Q. You don't know?           A. No sir.

Q. You don't know why that isn't here?

A. No sir.

(Testimony of Marvin Farmer.)

Q. Now you said that this demand in excess of 6500 didn't occur again after the 3rd of January 1946. Is that right?      A. That is not right.

Q. When did it occur again?

A. According to your meter——

Q. Yes.

A. ——you cannot tell if it increased to a point —just so it didn't increase to a point above the reading that it was set there. There would be no way to record it. You'd have to stand on watch at each half hour period to make a statement like that.

Q. As a matter of fact on the 3rd of January, 1946, when our City men checked your meter and our meter, they found a discrepancy, did they not, in the readings of the two meters?

A. It might have been a slight one, but it was not a discrepancy of noteworthy value. I believe that they were a few fractions off, but they weren't beyond the normal error of meters.

Q. They set the meter back to what position on the 3rd of January? [165]

A. The same position that it was in when they come to work on it.

Q. That was what?

A. Just slightly above 65, I believe. I know it was in the neighborhood—excuse me, seventy-five. I know it was in the neighborhood of seventy-five.

Q. All the local people were quite concerned about the fact that you were exceeding your 6500 demand over there, according to the City's meter, were you not?

(Testimony of Marvin Farmer.)

A. Very definitely we were concerned. That's what we're billed on—I mean that's what the company is billed on.

Q. And you knew that you were supposed to keep that below the 6500, didn't you?

A. That is correct.

Q. Yes, and the home office was after you about wanting to see that you keep it down?

A. That is correct.

Q. Yes.

Mr. Carothers: That's all.

### Redirect Examination

By Mr. Metzger:

Q. You did keep it down, did you not?

A. That is correct.

Mr. Metzger: That's all, Mr. Farmer. [166]

(Witness excused.)

Mr. Metzger: Call Mr. Jones.

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### ROBERT R. JONES

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Metzger:

Q. What is your name, sir?

A. Robert R. Jones.

(Testimony of Robert R. Jones.)

Q. And where do you live?

A. Akron, Ohio.

Q. Do you have a profession?

A. I am a consulting engineer—professional engineer in the State of Ohio.

Q. In what branch of engineering, if any, do you specialize?

A. My professional card is electrical, mechanical and metallurgical.

Q. Are you at present employed by Ohio Ferro-Alloys Corporation?

A. Under a retainer. I'm not on their payroll.

Q. As a consulting engineer? [167]

A. As a consulting engineer.

Q. Did you have any connection or problems with—by Ohio Ferro-Alloys Corporation in 1940?

A. Yes, sir.

Q. What was the nature of that?

A. I was employed to make a trip to the Pacific Northwest to investigate sites and power conditions and to determine a location for a western plant.

Q. Did you approach the City of Tacoma?

A. I did.

Q. Whom did you contact?

A. Mr. R. D. O'Neil.

Q. He was then Commissioner of Public Utilities? A. Yes sir.

Q. And, with what result—what was the result of your contact with him?

A. I took back with me a proposal—a proposed contract offered me by Mr. O'Neil for a block of

(Testimony of Robert R. Jones.)

power, or a quantity of power sufficient for the plant that we then had in mind building.

Q. Was that for a one single furnace operation or a multiple furnace operation?

A. No, it was for a single furnace operation primarily with a paragraph in there, or a consideration for a second furnace which was not then authorized, but a second furnace [168] was provided for in this original proposal that Mr. O'Neil gave me.

Q. Following that proposal, briefly, did you have any further connection or negotiation of contract that was ultimately entered into?

A. I came back in late January '41.

Q. Did anyone accompany you?

A. Mr. Weitzenkorn.

Q. Who is he?

A. He was the executive Vice President of the company.

Q. When you got here, whom did you contact or deal with?      A. Mr. R. D. O'Neil.

Q. Mr. R. D. O'Neil. I take it, you were still endeavoring to get a contract that would be acceptable for the furnishing of electrical energy, is that correct?      A. That's correct.

Q. Well, at the time of that meeting what were the principal points of difference or disagreement between——      A. Well——

Q. Ohio Ferro on one side and the City on the other?

A. There were three or four major points. One

(Testimony of Robert R. Jones.)

of them was starting rate. The reason for certain amount of experimental work which we'd have to do in a new industry and a new location with new raw materials.

Q. All right. [169]

A. The second was the question of power factors.

Q. Yes.

A. The third was the escrow rate—escrow clause.

Q. The escrow clause.

A. And the fourth was a discussion on the second furnace—second block—the taking of the second block.

Q. I see. Well, in this lawsuit we're concerned only with the second block, so—now, getting down to the second block, what matters of difference—points of difference were there that developed when you commenced your negotiations at that time?

A. As I remember it, the City's proposal provided for but one taking and a then permanent suspension. The—we knew that there would probably be more than one taking, business affairs being as they usually are, so we had to provide for more than one taking of the furnace. In other words, the first taking and then a shutting down, and then if business conditions developed—bettered, a second taking and so on until the lapse of contract.

Q. Now, you're talking about—specifically about the block of power or load for the—for the second furnace operation.

A. Yes.

Q. Is that correct? [170]

A. Yes, sir.



(Testimony of Robert R. Jones.)

Q. All right. One question before I go on with that,—what time was it that you were here with Mr. Weitzenkorn?

A. It was the latter part of January of '41.

Q. Latter part of January. Well now in addition to this question of provisions for suspension and resumption of taking of the power for the second furnace, what other matters of difference or—

A. Well, these other matters that I mentioned before——

Q. I'm talking only about the second furnace.

A. Oh, about the second furnace?

Q. Just the second furnace.

A. Well, the discussion turned somewhat on the first taking and first session of that furnace. As I recall it, the City had made a proposal that after the running of the second furnace for a time; in other words, the first taking which was in that case the only taking, then we—we would be required to buy from the City a separate set of power to serve that second furnace. Our counter-proposal which I wrote and sent Mr. O'Neil prior to my visit here provided that we pay the interest on that equipment only during the time that we did not use the second block.

It is my recollection now that Mr. O'Neil [171] said that that was—neither one of those things could be done legally by the City. He didn't explain why or what but the statement was made and I heard it. Therefore, he proposed an alternate which is incorporated in the contract.

(Testimony of Robert R. Jones.)

Q. He proposed what? A. An alternate.

Q. I see. I misunderstood you.

A. Which is the alternate in the contract.

Q. What was that?

A. That we pay for this second furnace—second block at the time of the first taking for twelve months, whether we used it or not. The minute we engaged—took on this block we were required to pay for it for a year. The reason for that was that this year's use would give sufficient revenue to the City to pay for the labor they would be put to to install equipment for the use of the second block.

Q. I see.

A. That was the first taking, the first year and then that only.

Q. All right. You said, that was the condition that was laid down by Mr. O'Neil?

A. Mr. O'Neil's condition.

Q. And that was the final action of you and Mr. Weitzenkorn [172] with respect thereto, you accepted that?

A. We accepted it.

Q. All right. Now, what—as I understand it, when you—your original conversations or discussions, your proposals contemplated that you might put on more than one—more than a second furnace—might have, perhaps, multiple furnace operations?

A. Well, that's all the provision engineer makes. He doesn't know—

(Testimony of Robert R. Jones.)

Q. Well what did Mr. O'Neil say about that?

A. He wouldn't stand for it. He said, "No", he wasn't interested in more than two furnace operations here.

Q. I see. So, he laid down this condition that—

A. He laid down that condition.

Q. —to have the one furnace operation as an initial block and the second furnace operation as one additional block of power?

A. That's right.

Q. Now, you said one of the things you were concerned about—you—Ohio was concerned about was the right to take the furnace for the second block, suspend the taking and later on resume the taking of current for that block?

A. That is correct.

Q. In your negotiations with Mr. O'Neil what was said—done about that? [173]

A. That was provided for.

Q. How—what did Mr. O'Neil say and what did you say and so on?

A. It was provided for in this way. Mr. O'Neil said that after it's first use—

Mr. Carothers: Just one minute.

The Court: I think I shall sustain the objection to all this detail and discussion, Mr. Metzger, that is set forth finally in the contract. What we're concerned with is the contract and not all of these details, and I will sustain an objection. I assume that one was made.

Mr. Carothers: Yes. I object.

(Testimony of Robert R. Jones.)

Mr. Metzger: If your Honor please——

The Court: If he wants to talk about what's in the contract and you desire to ask him about any particular paragraph of the contract that is pertinent to the controversy here, why you'll not be limited or denied that right, but surely we must give some consideration to a written contract as it was finally and solemnly promulgated and put forth.

Mr. Metzger: That's true except that it——

The Court: You can't vary its terms by what one witness says his understanding was and another——

Mr. Metzger: Well, I—I'm not trying to [174]

The Court: Well, let's get along now. If you have some particular questions you wanted—on the phase of the contract.

Mr. Metzger: All right.

Q. Mr. Jones, if you'll take a look at the contract in evidence here—I don't know what the exhibit number is now—and turn to Article 10, sub-paragraph (A). The caption of that sub-paragraph says—the caption of the Article is Alteration or Cancellation of Contract Demand. The caption of sub-paragraph (A) is "For contract demands in excess of the initial block of six thousand five hundred (6500) kilowatts." To what does that refer?

A. That refers to the second block—second furnace block.

Q. Second block. In other words, this contract provided for two blocks of power?

A. Correct.

(Testimony of Robert R. Jones.)

Q. Now, in that sub-paragraph (a) there is a provision—think it's in the second paragraph—"In the event the corporation elects to exercise its right of alteration,"—"and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City's judgment, surplus power is available in sufficient quantity to meet the Corporation's additional requirements." Now, in respect to that paragraph—to that sentence Mr. Jones, in your negotiations with Mr. O'Neil, what did he say as to what—about surplus power?

A. Surplus power was understood and discussed and agreed to there, was that power which the City had had or might have available over and above a—commitments to their contract customers or to their regular customers at that time.

Q. What did Mr. O'Neil say about the phrase in this sentence that I have read to you, "in the City's judgment"?

A. Well, of course the City would have to exercise its judgment in that because it alone had the data. We had no data upon which to exercise our judgment as to how much power the City had available.

Q. So it was the City's judgment as to whether they had surplus power?

A. Correct.

Q. But if they had surplus power and you wanted it, you could resume operation on the second furnace?

A. Yes, sir.

(Testimony of Robert R. Jones.)

Q. Is that right? A. That's right.

Q. Now, what you said about the definition or discussion of surplus power, the term is then understood or [176] defined—is that your definition or connotation of that term in the electrical world—

A. That's the common use of that term—that term is commonly used.

Q. Now, the next sentence in that paragraph, Mr. Jones, "If and when the Corporation and the City mutually agree that the City will again deliver power," it says "such service will be on a firm basis and payments for the energy used shall be made according to the provisions of the contract." What was said, if anything, about—by Mr. O'Neil—the City, what was meant by "payments for the energy used"?

A. Why it meant just that—that we would pay for the energy we took at the time we took it, and certainly not for the time we didn't take it.

Q. Well, now, let me—let me get this clear. This contract makes no provision for a consumption or energy rate, as such, does it?

A. Except in the starting period, no.

Q. Except in the starting period—the first six months when you're getting underway.

A. Yes.

Q. It's all on a demand basis?

A. All on a demand basis.

Q. Whether it's the first load or the second load? [177]

A. It's on a block power basis, really.



(Testimony of Robert R. Jones.)

Q. I see. So actually, at no time, was payment made on the basis—exactly of the energy used?

A. No, sir.

Q. Payment was always based on the demand—that is, on the possible—total amount you could use?

A. Yes, sir.

Q. And so herein, the term “payment for the energy used” is payment for the time you had the right to impose the demand for the second block?

A. That is—that was our understanding.

Q. Is that what Mr. O’Neil said to you?

A. Mr. O’Neil said that, yes.

Mr. Carothers: We still object to all this testimony.

The Court: It isn’t very helpful to The Court in interpreting the issues that are being submitted.

The sum and substance of this paragraph was that if they went on again with the second unit, they’d have to pay at least for 6000 kw’s.

The Witness: Correct.

The Court: And then if they exceeded 6000 kw’s at any time, they’d pay on a demand basis.

The Witness: Yes, if they exceeded 6000 kw’s at any time coupled with the other unit, well then [178] the “ratchet” clause would go into effect, and they’d pay on the then demand, which would be the billing demand.

Mr. Carothers: You’d combine—if the two furnaces exceeded 12,500.

The Court: I understand that and I think that is quite clear. What we are primarily concerned



(Testimony of Robert R. Jones.)

with in this case, of course, is—as to whether there was a suspension on the provision of Section 19 of the contract, or whether there was a suspension by mutual agreement and whether the second taking that actually did occur here, was a new taking so it would be covered by this one year's liability.

Mr. Metzger: Well, partially. The first two phases are correct, your Honor. The second phase, I'm not so—I think is important and I think this contract is not clear, and that's why I think the circumstances under which it was entered into and the terms as understood by the parties who negotiated is proper.

The Court: The Court isn't going to go into that because to me, it is clear enough, Mr. Metzger. It's clear enough for the purpose of—the Court hasn't judged upon this particular phase of it. If there was any particular discussion about this thirty day notice, I would be glad to have if this witness discussed with the [179] other parties, as to what constituted a thirty day notice.

Mr. Metzger: I don't know.

The Court: Frankly, your—the admitted facts here throw very little light upon that. The testimony so far hasn't—whether a letter had been written that within 30 days from this time we are going to cease to take the power for the second unit, and then 30 days came and they continued to take power. Now if there is anything—if there is anything—any discussion—

Mr. Metzger: Well, there is no discussion about

(Testimony of Robert R. Jones.)

that so far as I know. May we recess at this time, if your Honor please?

The Court: We've got to finish this case today, Mr.—

Mr. Metzger: I appreciate that——

The Court: And I don't know——

Mr. Metzger: ——the desire of the Court to finish.

The Court: ——how many witnesses the City has.

Mr. Carothers: I think in view of the statements the Court has made, the defendant can shorten considerably our testimony because the position the Court has taken would indicate that the Court considers that testimony more or less immaterial any way—that is, all these discussions leading up to the signing of the contract. [180]

The Court: Well, I think the discussions and the exchange of correspondence and so forth between Mr. O'Neil and the parties, are very material.

Mr. Carothers: You are referring to the suspension?

The Court: That's right.

Mr. Carothers: I was speaking of the negotiations leading up to the contract, your Honor.

The Court: That, I shall have to limit the testimony substantially in that regard, because doubtless there were many hours of conversations and discussions.

Mr. Metzger: Well, we're not going into anything except that bears on this point.

(Testimony of Robert R. Jones.)

The Court: As a matter of law, of course, unless the contract is ambiguous in its terms, it's the culmination of all these various negotiations, and the Court will not lightly set any part of it aside, unless it is so ambiguous or uncertain that we can't—

Mr. Metzger: Well, we don't ask that any part be set aside. We ask merely that it be interpreted.

The Court: Well, there are two things that I am going to have to interpret here, as I have indicated. One is, whether there was a suspension by reason of some [181] situation arising beyond the control of the parties under this Section 19 of the Act, or whether it was by mutual consent and agreement, both parties feeling it was to their advantage to suspend at the time. There is no question involved here but that there had been a use for the twelve month period.

Mr. Metzger: Yes, sir.

The Court: That is conceded by all of the parties. And then, whether this resumption was a resumption under the provisions of this contract,—that required another twelve months before there could be any change made, or whether it was just a taking up where the break had occurred earlier and it was subject to suspension then under the thirty day limitation—thirty day notice as provided in the contract.

Mr. Metzger: That, I think your Honor—your Honor's statement to me indicates that your Honor is slightly confused in that phase of the case. The issue—the first two propositions are these: If this

(Testimony of Robert R. Jones.)

suspension excuses under Article 19, then we have in effect a continuous taking until the time whenever it was dropped in 1945 or '46, and that's that.

Then we have the question whether it was a—a taking which, by mutual suspension—the original suspension, was wholly outside of the contract and it [182] doesn't count, so that the suspension in '45 was an initial suspension. Then lastly, we have the question which is the declaratory part of the question, the case. That's the interpretation of this contract, so in the future, in the event we should—the City and the Company should agree to resume delivery to this second furnace, would the Corporation have to take and pay for a year's operation or could they take and—if the City agreed that they might, and then suspend after taking for six months and only pay for six months.

Mr. Carothers: You don't mean by agreement.

Mr. Metzger: No, by the terms—but I said, if the City and the Corporation should mutually agree to resume delivery. That's the language of the contract, then the contract says that we take it and we can alter it downward upon three—one month's notice. Then the question is, if we do that, of course, the City may never agree, the City may never have surplus power, but we're asking the Court to determine what our rights are in case they should. We contend that under the terms of this contract, properly construed, if that event occurs or if it has occurred in the history of this Corporation, that our liability for taking this—on the second taking of

(Testimony of Robert R. Jones.)

the second block or second load [183] is limited for the months that we took it.

The Court: Well I have several questions in mind, but I'm not going to ask them now because we would be here until one o'clock.

We'll now take an intermission until two o'clock this afternoon.

(Recess.)

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2:00 o'Clock P.M.

The Court: Now, you may proceed, Mr. Metzger. I don't think you had finished your direct examination, had you?

Direct Examination

(Resumed)

By Mr. Metzger:

Q. How extensive has been your experience and practice as an electrical engineer?

A. I have an engineering degree from the Stevens Institute of Technology, in the Class of 1901, and I have been connected with power work, in one form or another, substantially ever since that time.

Q. Just briefly, do you work for any public utilities, electrical——

A. I never have.

Q. What?

A. No, not in the period I am testifying about now; I did work for some railway companies before I went to college.

(Testimony of Robert R. Jones.)

Q. Now, your work has been since 1901 largely in the electrical field?

A. Not altogether, electrical and mechanical.

Q. Mr. Jones, to an engineer, particularly to an electrical engineer, the contract relating to the supply and the taking of electrical energy, what does the term "load" [185] mean?

A. Why "load" generally speaking, means a block of power, or a quantity of power.

Q. Quantity of power. Well, now, referring to the contract which you have in your hand, Exhibit 2, I think——

The Court: The Exhibit's right on the front of the document.

Mr. Metzger: 5—Exhibit 5.

The Court: Exhibit 5.

Q. And turning to Article X, I think it is the last paragraph of sub-section (a). There is an expression in there: "and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load"—what, as an electrical engineer, one versed in contracts for electrical energy—what does that term "this load" refer to, in that contract?

A. What paragraph was that, Mr.——

Q. Section 10, subsection (a). I think it is the last paragraph, it's in, or the last unnumbered paragraph just before the sub-paragraph beginning (b).

A. Oh, over here. Well, that refers to the 6,000 kilowatt block.



(Testimony of Robert R. Jones.)

Q. You mean the block for the second furnace?

A. The block for the second furnace.

Q. And the expression "at least twelve (12) consecutive [186] monthly payments"—is the twelve consecutive monthly payments that were required to be made at the first taking from that block, or load?

A. Why, they required twelve consecutive monthly payments on that block, and——

Q. When it says in that same paragraph that—just referred to "at least twelve consecutive monthly payments," that means the first twelve monthly payments that were required when the Company first took this second block of power?

A. Correct.

The Court: It doesn't seem to me that's a matter of interpretation at all; it's as plain as can be, and there isn't any question. The Court understands that, Mr. Metzger.

Q. Mr. Jones——

The Court: I would like to have the witness explain what he understands by the term "ratchet clause."

The Witness: Well, your Honor, a ratchet clause is a term that applies to demands taken over, the contract demand, in which the——

The Court: The charge is made on a peak load thereafter?

The Witness: For eleven months.

The Court: Or for a month, or whatever it is.

The Witness: Well, whatever the ratchet clause [187] in here—generally speaking, it is for a term



(Testimony of Robert R. Jones.)

of months. That billing demand obtains and holds for that time, whatever is specified in the contract.

The Court: Well, it's conceded here, isn't it, that it holds for a month, or for the whole twelve months?

Mr. Carothers: It holds for eleven months.

The Court: For eleven months, then?

Mr. Metzger: That's not conceded, your Honor.

The Court: Which is this ratchet clause in your contract—which clause is the ratchet clause?

Mr. Metzger: You'll find it, your Honor, please, I think there is no dispute about it, as a matter of fact, if you will turn to paragraph 7, of the contract——

The Court: Under "Billing Demand?"

Mr. Metzger: Yes, a proviso at the end of that paragraph, it says: "provided, however, that the billing demand for any month shall not be less than the highest actual demand which occurred during the immediately preceding eleven months——

The Court: I see.

Mr. Metzger: Well, that is, I think, conceded by everybody to be the "ratchet clause" of the contract. I don't think there is any dispute about it. As a matter [188] of fact, the only time the word "ratchet" clause is used, it says: "the ratchet clause specified under Billing Demand."

Q. Mr. Jones, you're familiar with the devices installed by the Ohio Ferro-Alloys Corporation to record and limit demands imposed upon the City's electrical facilities?

A. I am, I designed it.

(Testimony of Robert R. Jones.)

Q. Of what do they consist?

A. Well, the power coming into the plant comes first through the City's ratio transformers, and then through a similar set on our bus bars, there being only a short distance between them and no use of power so the same current passes through one as through the other. These current transformers operate a watt hour meter, recording the energy used by the plant in kilowatt hours. That watt hour meter is there principally to operate a demand limiter, which—this demand limiter the General Electric makes, is operated by impulses from this watt hour meter, which receives its energy or its portional energy from the current transformers. The demand limiter has on it two contacts, adjustable contacts. It is a machine in which a hand rotates every thirty minutes, which is the demand cycle; and it has a pair of hands which oscillate up and down every thirty minutes, or every demand cycle; and one of these hands rises steadily, and the other [189] hand rises as the demand is made. If it gets ahead of the ideal demand hand, which is the first one, showing that we are taking power faster than we should, then an alarm is sounded; and after a few seconds' time delay, it trips the oil circuit breaker on a furnace. The furnace that is—one of the furnaces that is energized. If we are operating two, it trips one of them; if we are operating only one, it trips that one, thereby stopping all power until the beginning of the cycle

(Testimony of Robert R. Jones.)

again, when we can again throw in the furnace. Well, that's demand limiter.

Q. Under the operation of that furnace, or that demand limiter if set to trip or open the oil circuit breaker, that you speak of, below 6,500 kws.—

A. It will open it wherever it is set.

Q. Well, if the limiter is set below—say 6,380?

A. If it's set below 6,500, or if it's set at 6,380, it would take the furnace off when it reached that point.

Q. And that demand limiter is set at the beginning of where the power comes into the plant, is that right?

A. Exactly, it's operated from the same *radio* transformers at the entrance to the plant.

Q. At the City's—the same potential or ratio transformers that is the same as the City's?

A. Well, the City—they're similar—the City have theirs [190] on a pole out there, and ours are in our switchboard structure. Now the second limiter is a—operating off the same ratio transformers as the Westinghouse demand curve drawing, or strip chart demand meter, which draws for each half hour, a curve or a line, the height of which represents the power taken in that area. Now it, too, has contacts—an adjustable contact that can be adjusted to limit the height what this line may reach before the contacts are energized; and once they are energized, it also trips the circuit breakers.

Q. Well, so we don't confuse the Court or counsel, this graphic demand meter, or Westinghouse

(Testimony of Robert R. Jones.)

graphic demand meter, was not set up to act as a demand limiter, prior to some time in 1946, was it?

A. I don't know when it was energized.

Q. You don't know?

A. No, I don't know.

Q. So as far as you are concerned, you are not here to make any claim that it was?

A. No, I don't know.

Q. Now, the chart or graph that this Westinghouse demand meter makes, did you as part of your duties, did you, or did you not examine that chart, during the time the—from say the 1st of September last year to the end of February—from the 1st of September, 1945, to the end of [191] February, 1946?

A. I couldn't say that I examined them all. I examined all that came to me, and most of them came to me.

Mr. Boyle: We are objecting, your Honor—we renew our objection to all this oral testimony about this graph. They haven't explained yet why——

The Court: I think I shall sustain the objection. If this graph is material, it must first be shown that it's not available. If he has an independent recollection, and if it is available, it would be the best evidence.

Q. Well, Mr. Jones, do you know where that record is, that chart?

A. No, sir, I do not. I suppose you mean the one for December, January——

Q. Well, I mean for the period, for say——

(Testimony of Robert R. Jones.)

The Court: Mr. Metzger, it seems to me this witness naturally wouldn't know. He is just a consulting engineer, he wouldn't know——

Mr. Metzger: That's right, I think that is correct, your Honor. Well, I would still like to recall this witness, or I could send an interpellator witness here to show that that graph——

The Court: No, if this graph is available and you want to make use of it, as an evidentiary fact, [192] why it should be brought here and offered as evidence. If it's lost and someone has examined it, why, of course, they can give what their recollection is of its reading.

Mr. Metzger: Well, that's——

The Court: Now, you'll have to take one of the other positions; if you've got it——

Mr. Metzger: Well, that's the point, if your Honor please, for my information, I would have to put Mr. Cunningham on the stand; he's been in communication with Canton, and he informs me that it's believed to be in Canton, but it has not been located. Now it's in Ohio and we can't get it here, and I think that's a correct statement.

Mr. Carothers: Both Mr. Cunningham and Mr. Pritz testified positively in direct examination they were over to the plant here the other day, but Mr. Metzger said it was thirty or forty feet long, and it was too burdensome to bring it here, and when we demand the right to inspect it, it ends up in Canton.

The Court: Well, just a few pointed questions to this witness concerning that, and that's all that

(Testimony of Robert R. Jones.)

is necessary; and from that, if he examined it for any particular period and has an independent recollection of what it really was, why the Court will permit him to state. [193]

Q. Well, did you examine that chart for any period during the latter part of 1945 and the first two months of '46?

A. I examined them, and calculated the short piece of chart sent me, purporting to be for the latter part of December and for the early part of January——

Q. And that's all?           A. That's all.

Mr. Metzger: No further questions then if that is all that you examined.

The Court: And that's the piece that's in evidence.

Mr. Metzger: That's the piece that's in evidence.

The Court: And is that all the direct examination?

Mr. Metzger: I have only one more question.

Q. In addition to this demand limiter—General Electric demand limiter and the Westinghouse portable demand meter, did the Ohio Company have installed any other devices that in any way recorded or regulated or controlled the amount of electrical energy that could be taken at any one time?

A. No, sir.

Q. Did they have any sort of a recording device that [194] indicated and recorded the quantity of energy that was being taken?



(Testimony of Robert R. Jones.)

A. Well, they had those two instruments, or that one instrument that recorded the demand, and——

Q. Did they have any instrument specifically. Some testimony here has been given about the furnace transformer instrument relating to the heat of those transformers?

A. Oh, yes, the furnaces are both—each individual transformer, one transformer on each furnace, both of them are equipped with hot spot indicators and recording temperature gauges and temperature thermometers; and they record the temperatures, presumably the hottest spot in the line of those transformers.

Q. And there's—do I understand that there is a separate transformer for each furnace?

A. Yes, sir.

Q. Well, what does that temperature recording instrument—what does it say?

A. It is supposed to show the temperature of the windings of the transformers. The temperature, as the transformer's load is increased, the temperature is increased by—due to the resistance of the transformer and other things, so that the more load it has on it, all other things being equal, the higher its temperature rise is.

Q. I see. What is the effect of a sudden increase? [195]

A. Those hot-spot indicators are extremely sensitive, and they show the influence of a sudden increase within perhaps five minutes.



(Testimony of Robert R. Jones.)

Q. Well, if you were carrying a load on this transformer of say 6,300 kilowatts; and it suddenly increased to 7,500 kilowatts, would that be recorded or registered, or shown in any way by these temperature recorders?

A. That's what they're for, to show that kind of a thing, and it would show an increase in temperature.

Q. Would it be noticeable?

A. Yes. Since 6,300 is already an overload on the transformer, it would show a decided increase.

Q. Handing you two circular sheets marked for identification Plaintiff's Exhibit 13, ask you what they are?

A. They are charts from the recording thermometer.

Q. Well, assuming that the two—sides of that exhibit that are unruled, are records for December 31, 1945, and January 1, 1946, what do they indicate as to whether there was any imposition of any demand above 6,500, on either of those dates.

A. Well, it is hard to answer that question, in just that way, but I will say this; that the safe temperature of the transformer was not exceeded on any of these charts, and if it was approached quite often, I can see nothing here to indicate any particularly high load. [196]

Mr. Metzger: That's all.

The Court: Are you offering those in evidence?

Mr. Metzger: I think we'll have to identify them a little further before I offer them, your Honor.

(Testimony of Robert R. Jones.)

The Court: Do you have any objection to them being received?

Mr. Carothers: No objection.

The Court: They will be admitted.

(Whereupon recording thermometer chart referred to was received in evidence and marked Plaintiff's Exhibit No. 13.)

Cross-Examination

By Mr. Carothers:

Q. Mr. Jones, you were employed specifically to come out here to—called as a representative of the Ohio Company and negotiate this contract?

A. Yes, sir.

Q. With the City? A. Yes, sir.

Q. And you were here at the time the final draft was agreed upon, everybody was satisfied, and the Council passed an ordinance approving it in the form that you agreed upon, with our representative?

A. Well, not while I was here. They say that points were [197] agreed to, yes. The contract so far as I recall it, was not written until some time afterwards.

Q. It does determine things as it was agreed upon. A. I understand it, yes.

Q. You were thoroughly familiar with the terms at that time? A. Yes, sir.

Q. So that you understood that in the event, as is provided in Section 19—I should say Section 10, where the contract provides that the second furnace having been once put off and then the City and

(Testimony of Robert R. Jones.)

Company agreeing that it might go on the second time, the contract says: "if and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis"—you know that?

A. Oh, yes.

Q. Now you made some reference in your testimony to surplus power this morning.

A. Well, it's in the contract here, regarding surplus power.

Q. Well, it would be surplus firm power, would it not?      A. It would be, yes.

Q. In other words, if the City saw fit to let the second furnace come back on, the Company would have the right to keep that furnace on for the duration of the contract, is that true? [198]

A. Well, that would depend, Mr. Carothers, principally on what was mutually agreed upon.

Q. Will you point to anything in the contract that makes any reference to any mutual agreement, other than the mutual agreement as to whether or not the City would permit them to come back on.

A. Oh, no, the mutual agreement could cover lots of things, at least that's the way I understood it.

Q. That's if and when the Corporation and the City later mutually agreed that the City would again deliver power to the Corporation, yes, but what other mutual agreements could be entered into at that time?

(Testimony of Robert R. Jones.)

A. Anything that the two parties would agree to.

Q. Well, will you point out any provision in the contract that permits such an arrangement?

A. Except here it says that when the City and the Company's representatives mutually agree——

Q. To what?

A. The City shall again furnish power.

Q. Yes.           A. ——but——

Q. It will be on a firm power basis, would it not?

A. That's right, it would be if they agreed it would be on a firm power basis.

Q. The contract says it would be, doesn't it?

A. That's right.

Q. And later on, in the same paragraph, the contract states that the energy used, if they put it back on, would be paid—energy used and the bills paid accordingly to the provisions of the contract. In other words, they are going to pay for it according to the provisions of the contract, isn't that true?

A. They are going to pay for it as they use it, it says there.

Q. Turning to Section 4, (b-3) of the contract, that paragraph refers to—deals with the second furnace, does it not?           A. Yes, sir.

Q. And the last clause provides that: "except that the continuous and uninterrupted part year operation immediately following a full year's billing at the specified rate, shall be pro rated." What does that clause mean?

A. It means you pay for it after the first twelve months at the——

(Testimony of Robert R. Jones.)

Q. Now just a minute, what basis——

Mr. Metzger: Let him answer. You asked a question——

Mr. Carothers: Now I insist, your Honor, please——

A. After the first twelve months' continuous use, then you [200] —it is substantially billed by the month.

Q. Well, the provisions state in so many words that the "continuous, uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be pro rated," does it not? A. That's correct.

Q. You were familiar with that provision when you helped write it in the contract, were you?

A. This, of course, refers—I was. This refers to the first taking.

Mr. Metzger: You mean the first taking of the second block?

The Witness: The first taking of the second block.

Q. Well, this clause—this paragraph—is set up under Section 4 which deals with rates to the Corporation, does it not? A. That's right.

Q. And if you were familiar, as you state you were, as to all the terms of this contract,—if you expected that paragraph to apply only to the initial operation of the second furnace, why did you overlook requiring that the City so provide, in view of what you state your conversations and understanding with Mr. O'Neil was?

(Testimony of Robert R. Jones.)

A. Well, I know that paragraph did refer to the first [201] taking, and only that.

Q. Well, does it so state?

A. No, I don't know that it does so state.

Q. When and where did you examine this section of the record for those three days?

A. That demand meter chart?

Q. Yes. A. In Canton.

Q. Was it part of the big chart at that time?

A. Yes, just as you see it.

Q. You have no idea where the rest of that chart is? A. I do not.

Q. As I understand the setup at the plant, the City had its transformers, and then the company had a transformer for each furnace, isn't that right?

A. Well, yes, it has those, but I didn't say so. I said it had a set of metered transformers immediately following the City's.

Q. Yes.

A. On the mainline income. It also has transformers at each furnace.

Q. The City's transformers that was in the original installation was two 10,000 capacity transformers, were they not?

A. We are not talking about the same transformers.

Q. Well, I'm asking about——[202]

A. Yes. You are asking now about the incoming——

Q. That's right.

A. No, the original installation was a different

(Testimony of Robert R. Jones.)

transformer. I don't know what it was—the original, the first installation—I don't know what it was, I don't remember. And then following that, to answer your question, the City put in two plants of 10,000.

Q. What's the capacity of the Company's transformers?      A. 6,000 kva. each.

Q. The first one operated at 6,500, with a 6,000 capacity.

A. No, it takes some power to run the plant outside of the furnaces.

Q. Well, this demand limiter that you have been referring to, at least one of them is located on the furnace, is it not?

A. No. The demand limiter, the physical location, is at the furnace——

Q. Yes.

A. ——but it receives its impulses from the metered transformers on the incoming bus compartment. It is physically located out there, so the men and operators can see it.

Q. How much of a load does it take to heat up your—the Company's transformer to a—approaching a dangerous point? [203]

A. Well, the specifications on the transformers, the guarantees on which they were purchased, is a 55 degree centigrade wire for a full load; now that means that that full load, that 25 degree centigrade wire, which is about what we get out here, the top temperature will be about 80 degrees centigrade for 6,000 kva's.



(Testimony of Robert R. Jones.)

Q. It's not unusual for those—the load to go considerably beyond that—considerably beyond that point, does it not?

A. It depends on the temperature you are running your transformers. You're probably safe in that, but not over that.

Mr. Carothers: That's all.

Mr. Metzger: That's all.

(Witness excused.) [204]

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J. W. WEITZENKORN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, please?

A. J. W. Weitzenkorn.

Q. W-e-i-t-z-e-n-k-o-r-n? A. Correct.

Q. And where do you live now, Mr. Weitzenkorn? A. Sarasota, Florida.

Q. How long have you lived there?

A. Since October, '44.

Q. Were you formerly active with the Ohio Ferro-Alloys Corporation? A. I was.

Q. In what capacity?

A. From '42 to the time of my leaving, I was the executive vice-president. From '39 to '42, I was the assistant to the president; from '36 to '39, I was director of research.

(Testimony of J. W. Weitzenkorn.)

Q. And when did you leave the employe of the corporation? A. In October, '44.

Q. In October, '44? [205]

A. To be correct, it was September.

Q. That's when you went to Florida, am I correct in that? A. You are correct.

Q. Now, you're the gentleman who came with Mr. Jones out to Tacoma; and did carry on here the final negotiations leading up to the contract that's involved in this lawsuit, is that correct?

A. I am.

Q. When was that that you arrived?

A. The latter part of January, in '41.

Q. '41, with whom did you carry on those negotiations? A. With Mr. O'Neil.

Q. Was there anyone else representing the City?

A. Well, Mr. Kent was there a large part of the time.

Q. I see. Now, when you commenced these negotiations, eliminating anything else, because confining your answers solely as they bear upon the second block of power; that is, the power for the second or more furnaces? What were the points of differences with which you started the negotiations?

Mr. Carothers: Now, your Honor, we don't have any objection to taking the Court's time if the Court wants to listen to it. We concede he will make the same statements as Mr. Jones made.

The Court: Well, I don't know whether he [206] will or not, but if you will direct his attention to something that you have in mind, counsel, in your

(Testimony of J. W. Weitzenkorn.)

question, why we will get along much better. They may have had many points of differences that aren't involved here at all.

Mr. Metzger: Well, I was trying to avoid the objections, your Honor, that I was guilty of leading questions.

The Court: Let's proceed.

Q. Mr. Weitzenkorn, when you entered upon those negotiations the Ohio was seeking power for the operation of—or for how many furnaces was Ohio seeking power? A. Two furnaces.

Q. Two furnaces. They had been asking for more, had they not? A. They had.

Q. And what was the City's answer to that?

A. Well, they would only consider a definite additional load of 6,000 demand.

Q. And now under what conditions would they give that additional load?

A. Well, I wanted complete flexibility: that the Company had complete control over the stopping and starting of that additional load, and only pay for the energy when and as if we used it, but Mr. O'Neil insisted that he be [207] remunerated, or rather the City, be remunerated for the installation that would be required by them to take care of this additional load; and he offered that if we take the power continuously, or commit ourselves to a continuous use of that power, or that additional load, for 12 months, then thereafter, after that use, any additional use would be only on the actual energy used.

(Testimony of J. W. Weitzenkorn.)

Q. What was the attitude that he took and what did he say in general, about your proposition of flexibility, coming on and off?

A. He didn't agree to my request. He insisted that if we take the power and then once drop it, we can only go back if the City permits us to go back; and that was based entirely on—in their hands—as to the ability to give us sufficient power.

Q. Well, once they did permit you to cut down, then what?

Mr. Carothers: Your Honor, we renew our objection.

The Court: Well, I want to hear his answer to this question.

A. If he were permitted to come back, then we could use the power as long as the Company required it.

Q. Well, how about paying for it?

A. We paid only for the energy, or demand, actually used.

Q. And you could drop it on thirty days' notice, or something [208] like that? A. We could.

Q. And not be required to pay for it after you had dropped it? A. That is right.

The Court: Well, what about dropping it after twelve months, when you initially went on? Was it your understanding that you were being obligated to take it for the full period of ten years, or until 1951, if you once started taking it?

The Witness: No, sir.

(Testimony of J. W. Weitzenkorn.)

The Court: Couldn't you drop it then at the end of—if it had been used for twelve consecutive months by a thirty-day notice?

The Witness: We could drop it at the end of a continuous use for twelve months.

Q. Well, you could drop it before that, but you would still have to pay——

A. We would have to pay for a twelve months' use—for the first twelve months' use.

Q. And now we are talking about a resumption—in case you were permitted to resume after you had once dropped it; then in that case, as I understand you, you were permitted to resume, if the City and the Company mutually agreed, you would again be permitted to take it, you [209] could again drop it, but you would pay for it for the time covered between the time you agreed to go on and the time you dropped it. A. That is right.

The Court: At what rate, or what amount?

The Witness: Based on the demand base covering the period of time that we used the power.

The Court: Not on 6,000 kws.?

The Witness: We paid—there was an accumulation of the contract demand of 6,500 plus the 6,000, for that period of time that we actually used that combined load.

The Court: You say that was the understanding of the kind of a contract that you finally entered into?

The Witness: Yes, sir.

Q. Now, Mr. Weitzenkorn,——

(Testimony of J. W. Weitzenkorn.)

The Court: Well, just a moment, I want to say something. The contract reads "if and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation additional power requirements, such service will be on a firm power basis, to be altered downward only on the Corporation—only by the Corporation upon at least one month's written notice to the City whereupon payment for the energy used shall be made according to the provisions [210] of this contract"; did you understand that language in the contract to be that you would pay on the basis of 6,000 if you used that, or less?

The Witness: I understood that that meant that we would pay for the additional load when we used it, and during the time we did use it.

The Court: Well, I am assuming that if you went back onto the use of it, you used it, or some of it.

The Witness: That's it.

The Court: —but if you didn't use the 6,000, you mean you wouldn't pay for it?

The Witness: We wouldn't pay for that additional load.

The Court: If you only—if you went back and started the second furnace, but only used a 1,000 kws., you would only pay for a 1,000, instead of 6,000?

The Witness: We would only pay for the demand created.

The Court: Well—

(Testimony of J. W. Weitzenkorn.)

The Witness: On the 1,000, that's right, sir.

The Court: Proceed, Mr. Metzger.

Q. Mr. Weitzenkorn, I wonder if you understood the Court's question. This contract, in your negotiations, contemplated power being delivered, furnished in two separate [211] blocks, is that not correct?

A. That is correct.

Q. The first was the initial block of 6,500 kilowatts? A. That is right.

Q. And as far as that contract is concerned,—that block of power is concerned, that was furnished on a demand rate basis and you paid so much per month, for 6,500 kilowatts of demand, irrespective of the quantity you used, as long as you don't use more than 6,500? A. That is right.

Q. That is right. Now, if you take the second block of power as the initial taking, as I understand you, you had to pay for 6,000 kilowatts of power per year, whether you used it or not?

A. That is right.

Q. Now, if you take it on again——

The Court: Well, let's ask him this question; suppose it never went off at the end of twelve months, but just kept using it month after month, until the——

Q. You would continue to pay for that how long? A. As long as we used it.

Q. As long as you used it, but if you did go off and you resumed, then whether you took it at the rate of a 1,000 kilowatts a month, or you took it at the rate of 6,000 kilowatts a month, for the



(Testimony of J. W. Weitzenkorn.)

contract purposes, and [212] for payment purposes, you would pay at the rate of 6,000 kilowatts a month, wouldn't you?      A. That is right.

Q. That's good. Well, that is the way we understand it, but I thought you had some——

A. Well, I misunderstood the Court, I'm sorry.

Q. As long as you took it under a resumed taking, you pay for it on the basis as if you were taking 6,000 kilowatts a month, whether you were taking that much or not?      A. That is right.

Q. The actual number of kilowatt hours you took at any time, then—either on the one block or the other made no difference under this contract?

A. It did not.

Q. Now, Mr. Weitzenkorn, while you were, I think executive vice-president of the Company—strike that question. After this contract was entered into, did you have some correspondence with Mr. O'Neill regarding the contract in which you were asking for a modification of it, particularly with respect to the escrow clause?      A. I did.

Q. And Mr. O'Neil replied to you in writing?

A. He did.

Q. Handing you a letter, marked Plaintiff's Exhibit 6, I ask you if that is in reply to that—to your——[213]      A. It is.

Q. Now, sometime thereafter, did you have occasion to request of the City that you suspend—that the Ohio be permitted to suspend operations of the second furnace, under Article XIX of the contract?

A. I did.

(Testimony of J. W. Weitzenkorn.)

Q. Handing you again a letter marked Plaintiff's Exhibit 7, is that your letter making that request?      A. It is.

Q. And Exhibit 8, Mr. O'Neil's reply?

A. This is Mr. O'Neil's reply.

Q. Further correspondence ensued, culminating in Mr. O'Neil's letter of April the 11th, which I believe is Exhibit 11, is that correct?

A. This is correct.

Q. Well, I mean is that where the correspondence culminated?      A. It did.

Q. After that, and in accordance with that letter, Exhibit 11, did Ohio Ferro-Alloys Corporation suspend operation of the second furnace?

A. It did on April 26th, I believe.

The Court: Of '45?

The Witness: Of '44.

Mr. Metzger: Of '44. On that connection, if your Honor please, the City has made demand on us to [214] admit the genuineness of certain letters, including the letter of April 24, 1944, relating to this shutdown, which we ask be marked, and we offer it in evidence.

Mr. Carothers: It may be admitted, we have no objection.

The Court: It will be admitted.

(Whereupon, the letter referred to was received in evidence and marked Plaintiff's Exhibit No. 14.)

(Testimony of J. W. Weitzenkorn.)

Q. Mr. Weitzenkorn, in your letter of March 21—which I believe the Court has, you referred to—based your request upon interference by orders of the War Production Board, is that correct?

A. I did.

Q. Did you personally have anything—or any connection with the War Production Board?

A. I did.

Q. What was that?

A. I was a member of the Advisory Committee to the War Production Board covering chromium and silicon.

Q. I see. Well, now, the orders that you referred to in this letter of March 21st were, in general, what? What orders of the War Production Board did you refer to?

A. There is an order that when it became effective as an order from the War Production Board in January of 1944. [215] That covers orders to steel people to use large quantities of scrap to manufacture their alloys. The motive was to conserve the supply of chromium.

Q. Well, what was the situation with chromium at that time?

A. Chromium was the—an essential element that the War Production Board and the Government were trying to conserve, and there was a limited quantity available. Therefore, this order was directed to the use of scrap containing chromium, in order to conserve the supply.

(Testimony of J. W. Weitzenkorn.)

Q. Handing you photostatic copy of War Production Order M21A direction 4, dated January 21, 1944, and ask you if that is the order to which you have been referring?

Mr. Metzger: We offer the same in evidence.

The Court: It will be admitted.

(Whereupon War Production Board Order referred to was received in evidence and marked Plaintiff's Exhibit No. 15.)

Q. Now, some time prior to that—

Mr. Metzger: I want to take up that later—more about that in a moment—

Q. —was there an earlier order on the War Production Board? A. There was.

Q. That affected or interfered with the Ohio's production? A. There was. [216]

Q. What was that order?

A. In October, '43, allocations were dropped of chromium—were dropped by the War Production Board. Now that directly affected the operations of the Ohio Ferro-Alloys, in that the priorities and allocations were made to supply ferrochrome to the concerns that were normally not their customers. It depended entirely on the desire of the Government to expedite this production of essential material, and to conserve transportation facilities. We were supplying chromium to concerns largely that were not our normal customers; and when the priorities were cancelled or dropped, we had to go out and sell our product and endeavor to regain our position in the trade.

(Testimony of J. W. Weitzenkorn.)

Q. Well, as you say, "priorities," is that the right word, or the correct word—or should we say "allocations"? A. Allocations.

Q. Well, by that I understand you, Mr. Weitzenkorn, that under the Government's system, or War Production Board's system of expediting, or concentrating the war effort, they first inaugurated a system whereby if you wanted to get ferro-chrome, you had to obtain from the War Production Board an allocation? A. That is right. [217]

Q. And that specified from what producer the person desiring it should obtain it, is that correct?

A. That is correct.

Q. And Ohio, as a producer of ferro-chrome, could only supply it on such an allocation by the War Production Board? A. That is right.

Q. When those allocations, or the necessity of them was removed, the whole business of supply and demand was disrupted so far as ferro-chrome was concerned, is that correct?

A. That is correct.

Q. Now, did that allocation affect that cancellation of the allocational requirement of the W.P.A.—did that affect the Ohio Ferro-Alloys' operations, particularly at the Tacoma plant? A. It did.

Q. Explain to the Court how, and to what extent?

A. Well, I have some data that I had compiled under my direction, of actual sales data and the tonnage sold, to show the effect of the——

The Court: Well, can't you just state that——

(Testimony of J. W. Weitzenkorn.)

Q. Oh, just state in general terms.

A. Our sales dropped materially.

Mr. Metzger: Well, that's sufficient.

Q. Did you—at that time you made no request of the City [218] for relief under Article XIX.

A. We did not.

Q. Now, I hand you what is marked for identification Plaintiff's Exhibit 16, is that a copy of the War Production's order revoking allocations, concerning which you have been testifying?

A. This is the former order — of revoking allocations.

Q. Yes. Well, that's the one that you just have been testifying about?

A. No, I don't believe this is the one.

Q. Well, I call your attention and ask you to look at that, in which it says in there: "It will no longer be necessary for you to apply for allocations for ferro-chrome and other alloys," on down, and ask you to examine the whole thing.

A. This does refer to the order I had in mind, it was the date of it that confused me.

Mr. Metzger: All right, we offer the same.

The Court: It will be admitted.

(Whereupon War Production Board Order referred to was received in evidence and marked Plaintiff's Exhibit No. 16.) [219]

Mr. Metzger: Your Honor, please, I think it is in order for me to say that I think the witness has explained it. We are not offering in evidence the original order requiring allocations for deliveries of ferro-chrome. We are only offering the



(Testimony of J. W. Weitzenkorn.)

order revoking the original order, assuming that there was an order in effect, and it is now being revoked, because it is the revocation which the witness has testified had the effect on the company.

Q. Mr. Weitzenkorn, referring then to the later order, January 21, 1941—'44—Exhibit 15, how did that affect the Ohio's operations?

A. By the use of large quantities of scrap in lieu of ferro-chrome; and this was started by the Steel Division of the War Production Board, or about the middle, or the beginning of the fall of 1943, and the steel people recommended to the War Production Board, and proved to them that they adopt what was then known as "m.e. steels," national emergency steels, containing lower chromium, as an example, contents, and the order was finally issued in January of '44. but it went into effect towards the end of the year, and it directly affected us by curtailing the requirement, or use of ferro-chrome.

Q. And what was Ohio manufacturing in Tacoma at that time? [220] A. Ferro-chrome.

Q. Ferro-chrome. Well, now, that order was a Governmental regulation, was it? A. It was.

Q. And to what extent did it affect the Ohio's business?

A. The supply—the supplying of ferro-chrome to the customers, dropped materially.

Q. Well, did it—was it effective so that it made it reasonably impracticable for Ohio to use the second block of power for the operation of the second furnace? A. It did.

Mr. Metzger: That's all.



(Testimony of J. W. Weitzenkorn.)

Cross-Examination

By Mr. Carothers:

Q. This government order that you refer to, directed the manufacture of steel, required that you use scrap, is that right?

A. Will you please repeat your question?

Q. If the government order was directed to, or at, the manufacturers of steel, was it not?

A. It was.

Q. It required them to use larger quantities of scrap?      A. Right.

Q. No reference is made in that order to curtailing the [221] manufactures of ferro-chrome.

A. Not in those words.

Q. The fact is that the only effect upon your operation was an indirect effect, it depressed the market for ferro-chrome, isn't that true?

A. That is right.

Q. Yes. So it rendered it unprofitable for you to operate?

A. Well, there is more to it than that, Mr. Carothers. The supply of chrome, and chrome ore, was scarce; and the Government issued these orders to conserve the supply.

Q. So as you stated in your letter to the City, it was because of a depressed market for ferro-chrome that led you to request a second furnace?

A. That is correct.

Q. There was no order by the Federal Government that your operation be curtailed?

A. Not against us directly.

(Testimony of J. W. Weitzenkorn.)

Q. If some situation came about now, so that you had a—you couldn't operate your first furnace at a profit, if you couldn't find a market for the product that you did manufacture, you would have to suffer a loss, would you not?

A. We have to pay for the first block for the life of the contract. [222]

Q. The first block, or the second block, at that time were on the same basis, were they not?

A. We had already paid for it, for twelve continuous months.

Q. As far as Section XIX of the contract is concerned, the two furnaces were exactly on the same basis. Section XIX applied to both furnaces, did it not?      A. It does.

Q. So that if you had a right to shut down the second furnace, you had the right to shut down the first furnace, did you not?

A. If it affected the operation of the first furnace.

Q. So that it was—it was a matter of saving money was that prompted you to ask the City that they allow your operations to shut down, isn't that the fact?

A. No, that is not exactly the case. There's—the government regulated the amount of ore you could consume, by keeping close touch with your inventories, your sales, and production, and you were only permitted to use—to purchase ore from the government, in accordance with your requirements.

(Testimony of J. W. Weitzenkorn.)

Q. All right. Was there any order issued curtailing your purchase of ore that had any connection with this shutdown?

A. We couldn't buy if our inventories built up, and our orders dropped off. We couldn't buy ore to run [223] willy-nilly. We couldn't obtain it. The whole scrap order was formulated to conserve ore supply.

Q. Do you—you requested the privilege of shutting down your second furnace. All your representations were to the effect that the market was depressed, so you couldn't compete with the other people, isn't that right?

A. We referred to the curtailment, due to the scrap situation, and later on, when we actually did shut down, we added to that the labor situation. We could not get sufficient labor to operate two furnaces.

Q. That was true generally in industries here in the Northwest, was it not?

A. That is right.

Q. Should that happen now, would you claim that it came under Section XIX?

A. Well, that is a hypothetical question, Mr. Carothers, and I could only answer it that way.

Q. There was no government order limiting your manpower, was there?

A. No, sir, but a situation existed here, that really controlled it. Manpower was under government control.

(Testimony of J. W. Weitzenkorn.)

The Court: What was the condition that gave rise to your resuming operations of this second furnace, in February of 1945?

The Witness: Well, we converted the—one of [224] the chrome furnaces over to make—enable us to make ferro silicon, another product.

The Court: And then you had one furnace producing one product——

The Witness: And another furnace producing another product.

The Court: And is that the situation now, or was it——

The Witness: That is the situation today.

The Court: And then this ferro silicon furnace hasn't been in operation since 1946—in November, or December?

The Witness: Well, I am not in sufficient touch with——

The Court: Oh, I don't think that is in dispute very much.

Mr. Carothers: I think that is all.

(Witness excused.)

The Court: Do you have any other witnesses, Mr. Metzger?

Mr. Metzger: Yes, I think one more witness.

The Court: Well, I'll have to warn you here—I don't want to tell you you've got to finish, but then this case is going to have to go over again; [225] and I dislike very much to try a case piecemeal, I have got——

Mr. Metzger: Well, I appreciate. My next witness will be very short, your Honor.

The Court: We will take a ten-minute recess.

(Recess.)

The Court: Now you may proceed, Mr. Metzger.

Mr. Metzger: Yes, your Honor. [226]

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SAMUEL ARNOLD III

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, please?

A. Samuel Arnold, the Third.

Q. Samuel Arnold, the Third?

A. Third, right.

Q. Where do you live, Mr. Arnold?

A. Pittsburgh.

Q. And your profession?

A. I am a consulting engineer.

Q. In what lines?

A. Primarily electrical, specializing in electric furnaces.

Q. How long have you followed that profession?

A. Since 1916.

Q. What was your training therefor?

A. I was graduated from the Pennsylvania State College; I am a professional engineer, registered in Pennsylvania.

(Testimony of Samuel Arnold III.)

Q. Have you had much to do with electrical furnaces?

A. My experience has been rather wide. I have been consulting engineer for the United States Steel Corporation, [227] The American Bridge Company, and I have been more or less responsible for about seventy per cent of all the electric melting furnaces for ingot manufacturers in the United States and used in the United States.

Q. Now, has your experience in that connection brought you into connection with contracts for the supply of electrical energy for the operation of these furnaces? A. Frequently.

Q. In this case, Mr. Arnold, have you studied the contract between the Ohio Ferro-Alloys Corporation and the City of Tacoma, dated March 21st?

A. I have, and at length.

Q. For the purpose of reference, I hand you a copy of that contract, Exhibit 5. Now I would like to ask you a few questions. In Paragraph 10-(a) of the—yes, it's sub-paragraph (a), Section 10—the term "surplus power" is used here——

Mr. Carothers: Is this witness called as an expert?

Mr. Metzger: Yes, he is.

The Court: Well, let's hear the question, Mr.——

Mr. Metzger: Your Honor please, the purpose in calling this witness——

The Court: Let's proceed with your question, [228] Mr. Metzger.

Mr. Carothers: He has asked the question.

(Testimony of Samuel Arnold III.)

Mr. Metzger: I haven't finished it yet. I'll reframe it, so that it will be connected.

Q. In Section 10, paragraph (a) of this contract, there is the phrase: "The City will again supply the power referred to upon written request from the Corporation, only if and when in the City's judgment, surplus power is available in sufficient quantity." Now, to a person what does the term "surplus power" mean to the electrical profession, or the electrical trade, in that connection?

A. It usually means the amount of power available in excess of that required for contract obligations.

Q. So, if I understand you correctly here under this contract, if the City had, from its own generating sources, or else controlled a supply of power which was in excess of what the contract demands upon it called for, then it would have surplus power?

A. That would be my understanding.

Q. Well, under this contract it was the City's judgment as to whether that condition existed?

A. Well, under the terms of the contract, as I read it, that would be the case.

Q. Now, later on in that same paragraph, Mr. Arnold, there [229] is the phrase—it says: "If and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, and payments for the energy used will be made according to the pro-



(Testimony of Samuel Arnold III.)

visions of this contract." Now, Mr. Arnold, in your experience and in the electrical field, is it possible for there to be surplus power to the supplier and firm power to the taker?

A. If the supplier has surplus power and in their judgment, would agree to furnish that surplus power and make it on a firm power basis, then that would occur. In other words, it would be surplus power to the supplier, and it could be made firm power to the user, depending on the terms of the contract.

Q. Well, now surplus power, as you have defined it, as you have said it's used here, as long as it's surplus power, is it sold—is it remunerative or income producing power?

A. As long as it's surplus power and not sold, it doesn't bring anything into the supplier, of course; if they can dispose of that power, it's just that much to their advantage.

Q. Well, now that surplus power costs the supplier as much or less or what, compared to the ordinary—the power [230] required for the ordinary and regular departments?

A. Well, that is the same as on the incremental cost of the power; the surplus power in some cases, if it's water power, for instance, water going over the dam is not producing any energy. If it's going through the wheels, it's producing energy, and in that case the supplier would gain by disposing of that power, otherwise it would be simply wasted.

Q. I see. So what do you mean by the term "incremental costs"?

(Testimony of Samuel Arnold III.)

A. The cost of distributing and additional operations at the plant to produce that power.

Q. All the fixed charges and so on will have to be charged against the ordinary, regular supply of power, and not against the surplus power, is that right?

A. That's correct.

Q. Now, one more question, or two more questions. What is—in the last unnumbered paragraph of this sub-section (a), there is a phrase, “that the specified rate for this load”—what does the term “load” mean in electrical parlance?

A. “Load” in electrical terms means the quantity of energy, or block of energy, or in some cases it might mean the load on a bank of transformers. In this case, to me it means the same thing as the block of power—the load—— [231]

Q. Which block of power?

A. In this case, the second block of power.

Q. In this case, the second block of power. And in that same connection, reading this contract as an electrical engineer, of experience and training, it says just there: “and shall have made at least twelve consecutive monthly payments at the specified rate for this load”—what twelve consecutive monthly payments does that refer to?

A. Well, to me, it refers to the initial taking, for the reason that the initial taking was specified for a twelve-month period, to compensate for, you might say, turning on the power, to the cost of labor, and other costs of giving the customer that second block of power.

(Testimony of Samuel Arnold III.)

Q. So that as you see it, if you have made 12-month's payments at one time, you have satisfied the condition of having made at least 12 consecutive monthly payments? A. That is correct.

Q. Mr. Arnold, I would like to ask you a hypothetical question, based on this contract: If you assume that under this contract, the Ohio Ferro-Alloys Corporation commenced taking the first block, 6,500 kilowatts of power, in the summer of 1941, and commenced the taking of the second block in November of 1941, and continued the taking of both of those blocks until April, 1944; and then for the purposes of this question, dropped [232] temporarily the the taking of the second block, and subsequently with agreement of the City, resumed the taking thereof—that is of the second block, and again dropped that taking some eight, six, eight, or ten months later, less than—dropped it any period short of a year after the resumption of the second taking. In your opinion as an expert, what is the extent of the liability of Ohio in the way of paying for the second block of power under that resumed taking?

Mr. Carothers: Well, now I thought you here have the Court to interpret this contract——

The Court: That is strictly a question for the Court to determine. He may express his opinion. I say I consider it rather irrelevant, though, Mr. Metzger.

A. In my opinion, in accordance with this contract, and contracts of a similar type that I have

(Testimony of Samuel Arnold III.)

been familiar with, is that the contract once taken, and a payment made, that would be in the nature of a demand charge, based on a different type of contract, to compensate the City for the furnishing of that power. After the suspension of the first taking of that power—at the first taking and then suspension, and then second taking of power, the second taking, to me, would be on the basis of the amount of energy used—actual amount used. [233] Of course this being a demand type of contract, that would be on a monthly basis.

Q. Now, in this case, it would be measured by the time that that second block of power was taken, is that correct?      A. That's correct.

Mr. Metzger: You may cross-examine.

### Cross-Examination

By Mr. Carothers:

Q. Mr. Arnold, do you find anything in this contract that would indicate that if the Company resumes the taking of the second load that the contract demand would not again go back to 12,500, instead of 6,500?

A. I don't think that at all. If the initial block of power is being utilized and the second block of power taken——

Q. Yes.

A. ——the demand would then probably be in excess of the 12,500, because the demand might—the billing demand might be somewhat in excess of the contract demand.

(Testimony of Samuel Arnold III.)

Q. Well, the contract demand would go back up to—— A. 12,500.

Q. And that's what—as you will read that contract—that's what the Company is supposed to pay on, whenever they operate the second furnace along with the first [234] furnace, isn't that correct?

A. That's correct, but only for such length of time as they use it.

Q. Well, did you conceive that whenever two furnaces are operating, or are supposed to be operating, that the contract demand is 12,500, isn't that right?

A. The contract demand is 12,500 after the customer had notified you and you had agreed to give him the second block of power.

Q. Yes, and it wouldn't make any difference whether he only used a thousand kilowatts on the second furnace, they would pay for the 12,500, isn't that right?

A. That's right, until they notified you that they were no longer taking it.

Q. So that the clause of Section 10 that you referred to provides that if and when the second furnace is put back on, after the shutdown, that it would be on a firm power basis, does it not?

A. As far as the City is concerned.

Q. Oh, not as to the Company?

A. No, the Company, according to the contract, can notify you and not take the—give you thirty months, at least a thirty months'—a thirty-day

(Testimony of Samuel Arnold III.)

written notice and drop that second block of power, according to my understanding. [235]

Q. The contract doesn't state that, but that's your interpretation of it, is that right?

A. I don't know what——

Mr. Metzger: The contract so states in its terms.

Q. ——it's my understanding in reading the contract——

Mr. Carothers: Does it not——

The Court: Address your objections to the Court.

Mr. Metzger: I beg your pardon, your Honor.

Q. The contract states that if the second furnace goes back on it would be on a firm power basis, and the power would be paid for in accordance with the terms of the contract, does it not?

A. Certainly.

Mr. Metzger: Object, if your Honor please. The question is improper, purporting to quote the contract and not doing so correctly.

The Court: The objection will be overruled.

The Witness: May I ask you to repeat that question?

Q. The contract provides that if the furnace—the second furnace is put back on after having been off, that it will be on a firm power basis, and that the power be paid for on—in accordance with the provisions of the [236] contract—or words to that effect?

A. That is what the contract says, yes, sir.

Q. Going back for a minute, then your idea is



(Testimony of Samuel Arnold III.)

that the City, under your interpretation of this contract, the City if and when it saw fit to permit the Company to come back on with its second furnace, would be obligated from there on out to the end of the contract to furnish them that power for the second block, isn't that right?

A. That's correct.

Q. That the Company could shut down any time it saw fit?

A. That's correct, but a thirty-day notice to——

Q. And then if the City let it come back on again, they could shut down whenever they wanted to.

A. That's correct, if they give a thirty days'——

Q. You appreciate the fact that this power is being sold to this Company on a \$17.50 annual rate, do you not?      A. On a kilowatt-year basis.

Q. On a kilowatt-year basis, is that right?

A. That's correct.

Q. So isn't it true that in construing what "firm power" means, that you must take into consideration the terms of the contract, the fact it is a kilowatt year, the rate, doesn't that enter into it?

A. That does enter into it, but it says right there that: "If and when the Corporation should drop its additional [237] 6,000 kilowatt requirements, either temporarily or permanently, and shall have made at least twelve consecutive monthly payments at the specified rate for this load, that the ratchet clause specified under that the billing demand will be dropped proportionately.



(Testimony of Samuel Arnold III.)

Q. Where do you find the rate for that load set up—for this load? You said “this load,” where is the rate for this load?

A. The rate for this load is the \$17.50 rate, for a kilowatt year.

Q. Is it provided for in Section 4——

A. That’s correct.

Q. ——(3-3)—— A. That’s correct.

A. That’s the rate for this load.

A. That’s correct.

Q. And will you turn to Section (b-3)?

Mr. Metzger: 4.

Mr. Carothers: 4.

Mr. Metzger: Section 4.

Mr. Carothers: Section 4, (b-3).

The Witness: Section 4, (b-3), I have it.

Q. So that is the rate that would be applied, any time they dropped the second furnace, isn’t that true? A. I would not—— [238]

Q. The rate set up in (b-3), that’s the rate that would be applied?

A. That rate would be applied any time the City would again see fit to give them the 6,000 kilowatts additional power.

Q. Well, Section (b-3) provides that if they saw fit to give the thirty-days notice, that they pay for a full year, does it not, immediately preceding, whether they had operated a full year or not?

A. Well, I would take that to be the initial taking.

(Testimony of Samuel Arnold III.)

Q. Well, now it didn't say that, does it?

A. It does not say that, but this other clause that I have just read to you, would certainly indicate that to me.

Q. Oh, but you find nothing in that clause that would indicate that at all, do you?

A. Well, which clause do you mean?

Q. (b-3). There is nothing to indicate that that rate applies to the first, second, or third time that the second furnace operates, is there?

A. It says that \$17.50 per net year per kilowatt of billing demand, as in (2) above, except that the continuous and uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be prorated.

Q. A full year's billing, that says, does it not?

A. That's correct. [239]

Q. It doesn't say the initial billing?

A. It does not.

Mr. Carothers: I think that's all.

#### Redirect Examination

By Mr. Metzger:

Q. But subsection (a) of Paragraph 10, refers to at least twelve consecutive months' payments, does it not? A. Correct.

Q. And in construing this contract, you have to give effect to all provisions in it, do you not?

A. That's correct.

Q. You can't single out one, and assize it to the disregard of another?

(Testimony of Samuel Arnold III.)

Mr. Carothers: Well, I object——

The Court: Well, I will sustain the objection to that question.

Q. Now, Mr. Arnold, under this contract, dealing with that same last clause that I was talking about, it refers to the ratchet—provides that the ratchet clause will be dropped proportionately. How was the proportion to be determined?

A. That means to me that the billing demand should be dropped proportionately; in other words, if the contract demand, totalizing 12,500 kilowatts, is exceeded, to—say 13,500 kilowatts, and after due notice from the [240] Company, the second block of power is dropped, the billing demand after that time, is to be  $65/125$ ths, it would be, or 6500/12,500ths of the billing demand. In other words, that's what I understand the "ratchet" clause to mean, to drop in proportion.

Q. There would be nothing to base a proportion, unless upon the dropping of the second block of power, and the resumption of the taking thereof, the contract demand would drop from 12,500 to 6,500, is that not correct?

A. That's correct.

Q. In other words, in order for this last clause to be operative, it must be that upon a second dropping of the second block of power, the contract demand immediately drops to 6,500?

A. That is the contract demand——

Q. Contract demand?

A. ——drops to 6,500 and the billing demand would be in proportion.

(Testimony of Samuel Arnold III.)

Q. Drops down proportionately. And there is no provision—that changes the billing demand shall wait a full twelve months payment?

A. Not to my understanding. No.

Q. Providing that it shall be done immediately, whenever it is dropped.

A. That's entirely what gives me the understanding of the [241] whole situation.

Mr. Mezger: I see. That's all.

Mr. Carothers: That's all.

(Witness excused.)

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### LOUIS H. B. ROBINSON

produced as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

#### Direct Examination

By Mr. Carothers:

Q. State your name, please?

A. Louis H. B. Robinson.

Q. You are employed by the City of Tacoma, and have been for many years? A. Yes, sir.

Q. You are employed as a meter reader?

A. Yes, sir.

Mr. Carothers: Now these questions may be somewhat leading, your Honor, but I am hurrying them along.

(Testimony of Louis H. B. Robinson.)

Q. You have been acting in that capacity a good many years?      A. Yes, sir.

Q. And did you—did you in the performance of your duties, [242] did you read the Ohio Ferro-Alloys Company's meter?

A. For about the past three years.

Q. Commencing when, do you remember?

A. Some time in 1944.

Q. And ever since then you have read it continuously, is that right?

A. There was three months when my partner just went out on the tideflats for experience.

Q. During the period in controversy you were reading it?      A. Oh, yes, sir. Yes, sir!

Q. And you read that meter as I understand it, on the last day of the month as a rule?

A. That's true.

Q. Invariably, unless it fell on Sunday?

A. Yes, sir.

Q. The usual procedure was to go over, and there was a guard there, and did you have anything to prevent you from going in to read the meter?

A. Everything was locked, and I had to apply to the guard, and he would get me a pass written up and call for a man to read with me.

Q. And that would usually take about how long?

A. Usually about five minutes.

Q. Did that—during the time you were reading, did any change in the situation develop, as far as your being [243] able to get in to read the meter is concerned?

(Testimony of Louis H. B. Robinson.)

Mr. Metzger: I object, as immaterial and irrelevant, your Honor.

Mr. Carothers: It will be material before we finish.

The Court: He may answer.

A. Well, there was a very sudden change on December 31st in '45. They held me up about fifteen minutes.

Q. And what about January 31st in '46?

A. The same thing again.

Q. They held you up for how long a period of time?

A. Around fifteen minutes or so each time. I didn't keep exact track of it.

Mr. Carothers: All right.

Q. You read the meter as usual on those two occasions? A. Yes, sir.

Q. Handing you Defendant's identification A-4, those are copies of the original records of the meter readings and demand of the Ohio Company over a considerable number of months, including the period in question.

A. It covered three years, and I double-checked these copies myself today.

Mr. Carothers: All right.

Q. And those instruments contain the readings that you obtained on the various months in controversy here? [244] A. Yes, sir.

Q. Commencing with, including August, September, October, November, December, January and

(Testimony of Louis H. B. Robinson.)

February—that would be August '34 to February—August '45 to February '46, is that right?

A. Yes, sir, all of that and more.

Q. And in the reading of November 30, 1945, indicated what demand for the month of November?

A. Decimal 956 which was multiplied by 12,000, that means there was almost 12,000 kilowatts. The actual reading of the demand hand was decimal 956.

Q. For October?

A. No, November 30th. That's the reading I understood you to say.

The Court: How many kilowatts, did you say?

Mr. Carothers: Aren't you——

The Court: If they're not translated into——

The Witness: They're not translated into kilowatts. It's a multiplier, times 95.6% of 12,000. It's almost a full 12,000 load. Over 95% of 12,000.

Q. Aren't you confused? Isn't that the October reading?

A. October is .999. Over 10,000—nearly 12,000.

Q. The reading for both October and November approached close to 12,000?

A. Very close, just under. [245]

Q. And the reading for December, which you stated on the 31st of December, approached what?

A. That dropped to point 63.

Q. It would be about how many kilowatts?

A. Oh, it would be about——



(Testimony of Louis H. B. Robinson.)

Q. The maximum demand for that month?

A. Oh, we have got it figured up here, I can give you the exact figure.

Q. Okeh.

A. December 31, the actual load was 7,560.

Q. And for January 31st reading, in 1946?

A. That actual load was 7,404.

Mr. Metzger: That is on what?

The Witness: That is on the ledger.

Mr. Metzger: Go ahead. Was the meter read again on the 26th of February—February—is that right—1946? A. Yes, sir.

Q. And that demand showed what, for the month of February up to that time?

A. That dropped a way down to only one point 525.

Q. That would be about sixty three or four hundred or somewhere along there? Just under 6,500?

A. Just under 6,500, yes.

Q. In the first readings that you made which would indicate [246] that there was any load less than 10,000 was when?

Mr. Metzger: Your Honor, please, I object to this testimony. Counsel have supplied me with what purport to be the original records, and asked to substitute a copy. There is no such information on the original records handed me, as the witness is now testifying to.

The Court: Well, the witness is translating certain terms that he has there into kilowatt hours, I suppose, or kilowatts. isn't he?

(Testimony of Louis H. B. Robinson.)

Mr. Metzger: Yes, but he presumably has the figure on a copy which were taken off the original; there is no such a figure on the original.

Mr. Carothers: The meter reading is on the original.

The Witness: It is all right there. Look in the demand column. Maybe he isn't familiar with the meter card.

The Court: Proceed.

Mr. Metzger: Go ahead, I'll see if I can follow it.

Q. The first meter reading that you—wherein you would be able to discover the demand for any month had gone below 10,000, was when?

A. Below 10,000? [247]

Q. Yes.

The Witness: I have got to look at this.

A. You see, December 31st; well, to go back, the last amount over 10,000 was November 30th. Then December 31st, it dropped to 7,560, which was higher than they wanted it, and the men were very much worried about it.

Q. At that time when you read that meter on December 31st, did you have any conversation with anybody over there?

A. Well, the man I dealt with,—that was Mr. Farmer, he was quite concerned that it was higher than he had expected it to be, and he wanted it to be, because then he said they had dropped one furnace and they had expected it to be down to

(Testimony of Louis H. B. Robinson.)

the load that one furnace was supposed to draw. It was around a thousand too high.

Q. Yes.

A. So I told him that he had to admit there it was on our meter, and we both agreed that it read that. Well, I had never paid any attention to their meter, but I asked him what about their meter, what did it say, and he said that's the trouble, it's too high too, but he didn't say how much. That was December 31st.

Q. Well, you know the kind of meter the Company had, beside our meter?

A. That was just above it.

Q. And that was a meter—the face of it only showed a [248] matter of twelve or twenty-four hours record at one time, and then it rolled up and you couldn't see it any more? A. That's all.

Q. So that you had no way of determining by looking at the Company's recording meter, what demand that type of meter might have registered during the month, is that right?

A. Yes, sir, I never even looked at it, because there was no use.

Q. Of course, your demand arm, when once pushed up any time during the month, stays at that point until you turn it down, is that true?

A. Monthly demand.

Q. Yes. On their meter all you can see is what is on the face of it at the time you read the meter?

A. Four, five or six hours at one time.

Q. Now, when you went back to read the meter

(Testimony of Louis H. B. Robinson.)

on the 31st of January, did you have a conversation with anybody at that time?

A. Well, practically the same thing over again. I used kilowatts, instead of the actual decimals on the demand. The load was almost the same. It was 7,404.

Q. 7,404.

A. Well, he was quite perturbed that time because of it [249] being that high, and he had to agree it showed that. Well then it was that I first began to wake up that there was something up that I didn't know about.

Mr. Carothers: Well don't go into that yet, Mr.—

Q. Yes, what did you discover on that occasion, the 31st of January?

A. Well, this particular kind of meter, each time I would get through reading it, I'd break the seal on the demand hand, and there is a little wire trigger there that I turned around and put the hand back to zero. This time, for the first time,—

Mr. Metzger: Which is this time, Mr. Robinson?

The Witness: January 31st—this is a very particular date, because this is only one out of hundreds that I ever thought anything about.

Q. Go ahead.

A. The face of the meter was loose and sagging, so I couldn't reset the demand. Immediately I figured there was something wrong, and I just quit right there, I did nothing, let it stay as it was and reported it.

(Testimony of Louis H. B. Robinson.)

Mr. Carothers: That's all.

The Court: Proceed with the cross-examination.

Mr. Metzger: Yes, your Honor. [250]

### Cross-Examination

By Mr. Metzger:

Q. Mr. Robinson, you say that you have been reading the Ohio meters since 1944, with the exception of about three months.

A. Three months in the middle of the summer of last year.

Q. You are reading them now; I mean that's part of your assignment? A. Yes, sir.

Q. You read them last month?

A. Yes, sir.

Q. Now, you say that when you went down there at the end of each month to read the meter, you would break the seal to reset the City's demand indicator?

A. After they are all agreed that everything is all right, and agree on the reading.

Q. You agree on the reading.

A. Agree on the reading first, and then the last thing before I leave, I reset it.

Q. Well, with whom did you agree on any reading for October 1st, 1945?

A. I haven't any idea what his name was.

Q. You don't know?

A. I talked with three or four different men. They never told me what their names was. [251]

Q. You don't know any of their names?

(Testimony of Louis H. B. Robinson.)

A. No, I remember Mr. Farmer and then, his name is Mr. Pritz, a young man that testified this morning.

Q. Pritz—P-r-i-t-z.

A. Pritz, yes. I remember those two by name, but the others I didn't know their names. In fact the man, right now, I don't know his name.

Q. On October 31, 1945, with whom did you agree?

A. Well, whatever man was on duty, I don't know his name.

Q. You don't know. On November 30th, with who did you agree?

A. Up to the time Mr. Farmer came back, there was a man there, but I have lost track of his name now. I knew it at the time, but I don't remember it now.

Q. On December 31st, with whom did you agree?

A. Mr. Farmer.

Q. He agreed with you, that your reading was correct, is that it? A. Yes, sir.

Q. Huh? A. Yes, sir.

Q. On January 31st, he agreed with that, too, did he? A. Well, every time he agreed.

Q. Every time he agreed?

A. Well, we couldn't quit until we did agree.

Q. And he told you, when you were down there on December 31st, 1945, and again on January 31st, 1946, that the Company had dropped down to a one-furnace operation?

A. He explained that was why he expected the demand to drop. That was the first I heard of it.

(Testimony of Louis H. B. Robinson.)

Q. And he told you that on both occasions, both December and January? A. Yes, sir.

Q. And that—he told you that he couldn't understand any such demand, that it couldn't be—that something must be wrong, didn't he?

A. That's what he thought.

Q. That the Company was down to a one-furnace operation, and that it couldn't go over 6,500?

A. Well, he was very much worried about it—it being so high, but I told him I couldn't help it.

Mr. Metzger: That's all.

#### Redirect Examination

By Mr. Carothers:

Q. Mr. Robinson, by agreeing—that when you say you and the Ohio Company man agreed, you mean that you agreed as to the meter reading of the City's meter?

A. That was the position of the City's meter card.

Q. You called him over and you both looked at it and you [253] agreed that was the proper reading? A. We both wrote down the same figure.

Q. You didn't mean to say you tried to agree that whatever figures they might have there, would agree with yours?

A. I never looked at their's.

Mr. Carothers: That is all.

Mr. Metzger: Mr. Robinson, just one question.



(Testimony of Louis H. B. Robinson.)

Recross-Examination

By Mr. Metzger:

Q. You never can tell from the end of the month when or how the City's demand meter got up to the point it then indicates, can you?

A. There isn't a thing to go by unless somebody watched it constantly every day.

Q. When you get down there at the end of the month you find it at a certain place, and you take it or leave it?

A. That's the way it works.

Mr. Metzger: That's all.

(Witness excused.)

The Court: Have you offered these copies?

Mr. Carothers: No, I will at this time.

The Court: Any objection, Mr. Metzger?

Mr. Metzger: I think not, your Honor. [254]

The Court: They will be admitted in evidence.

(Whereupon meter readings referred to were then received in evidence and marked Defendant's Exhibit A-4.) [255]

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LEONARD J. AVRILL

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

(Testimony of Leonard J. Avrill.)

Direct Examination

By Mr. Carothers:

Q. Your name is what?

A. Leonard J. Avrill.

Q. And you are employed by the City of Tacoma for many years?      A. Yes, sir.

Q. In the meter department?      A. Yes, sir.

Q. Repairing and overhauling meters?

A. That is right.

Q. In testing meters, inspecting meters, and so forth.      A. That's right.

Q. How long have you been there now?

A. Almost ten years.

Q. And did you have experience prior to that time in meter work?      A. Yes, sir.

Q. Did you have occasion in connection with your duties to visit the Ohio Ferro-Alloys plant on the tideflats?      A. Yes.

Q. It was said this morning—early in the day, that you were there on the 31st of December, 1945, is that correct? [256]

A. I was not there on December 31, 1945.

Q. You did go there, when?

A. I was there several times.

Q. Well, following December?

A. After that?

Q. Yes. When was the first visit to the Company after that?

A. January 10th, 1946, if I remember correctly.

(Testimony of Leonard J. Avrill.)

Q. Was there any information brought to you about any trouble over there on the 3rd of January?

A. The 3rd of January?

Q. Yes.

A. I don't remember just that date. It might have been on the third. It was recorded there some place, I don't remember or recall just off hand what it was.

Q. Well, do you have your work notes with you as to when you went over there?

A. Yes. I recall now, it was on January 3, 1946 that I was asked to test the synchronizing of our meter with the Ferro-Alloys meter.

Mr. Metzger: And that date, sir?

The Witness: January 3rd, 1946.

Q. And you and who else did it?

A. It was just myself and—you mean my partner?

Q. Yes.

A. Just myself and my partner. [257]

Q. And what was his name?

A. Ed Parker.

Q. Then on the 10th, you—I believe you said you went there on the 10th of January?

A. Yes, I was there on the 10th.

Q. In response to some instructions or complaint, or what?

A. I was there on January 10th, in regards to a test on the register, complained by one of the fellows at the Ferro-Alloys about the demand being too high; and upon coming at the plant and

(Testimony of Leonard J. Avrill.)

setting up for a check on that demand register, I found that all the four seals, on the duplex meter was broken and had been replaced to look like they had not been tampered with.

Q. That's the four seals on our meter that had been broken?

A. Our City meter, yes sir.

Q. We produced in Court here a meter. Is that the identical meter that was at the Ohio Company at the time you were there?

A. It is.

Q. And continued to be there until what date? Or did you have anything to do with taking it out?

A. I didn't have anything to do with reclaiming the meter.

Q. You were there on the 10th of January, 1946?

A. I was.

Q. And this meter was there? [258]

A. And that meter was there.

Mr. Carothers: We didn't repair it; we just brought it here for inspection, so the Court could get some idea.

The Court: I would like the witness to step down and show where these seals are?

Q. Will you just point out to the Court the four seals that you found broken?

A. Do you see it—right in each corner here, here and here.

The Court: What is the purpose of them?

The Witness: The purpose of the seals is to seal

(Testimony of Leonard J. Avrill.)

the cover on so that the cover cannot be removed, unless the seal is broken. The only means where the meter can be entered into these seals have to be broken. All four seals have to be broken.

The Court: Do they have to be broken every month, do they, if you are making your reading by the month, so that you can set your meter back?

The Witness: No, that is done by this re-set arm here only that we set the demand pointer.

The Court: Well, those seals cover that—is there a glass cover on that?

The Witness: This is a glass cover. A square, rectangular, square cover.

The Court: Well, what I am trying to get at, [259] does the glass have to be taken out so that the meter can be set?

The Witness: No, no. This reset arm here, resets the demand pointer on the demand gauge.

The Court: I see.

The Witness: This pulls out here after the seal is broken——

The Court: I see.

The Witness: This pulls out here after the seal is broken——

The Court: I see.

The Witness: ——and then you can reset the demand back to zero.

The Court: I see.

Mr. Carothers: The resetting device is sealed also, is that right?

The Witness: That is also sealed.

(Testimony of Leonard J. Avrill.)

Q. But the meter reader, under no conditions, is to break these seals.

Mr. Metzger: I object to that, your Honor, please.

Q. For the purpose of reading the meters.

A. No, he would not. The only seal the reader would break is on the reset arm in the middle of the meter.

Mr. Metzger: You mean that is the only seal [260] he would have to break?

The Witness: Yes.

Q. And those four seals were broken and pushed back when you were there on the 10th?

A. Yes, that was discovered when I went to break the seals to take the cover off the meter. I found all four of them had been broken and replaced.

Q. Now, did you have anything to do with the testing of this meter at any time?

A. No, I did not test that meter at the time this came up.

Q. Did you make a test of this meter on January 3rd or an examination without opening it up?

A. I made an examination without opening up the meter on the synchronizing reset with the Ferro-Alloys meter. It was just an external test, not having anything to do with getting into the meter at all.

Q. Did you find at that time that there was a discrepancy between the City meter and the Company meter?

(Testimony of Leonard J. Avrill.)

A. It was such a small discrepancy of a few seconds that it was agreed upon by Mr. Pritz there at the plant at that time that that was satisfactory.

Q. Did you make any test at all on the Company's meter at any time?

A. Yes, on March the 1st, 1946, I tested the Alloys' recording watt hour demand meter. [261]

Q. Well, what did you find in respect to that?

A. I found that their meter, that is the graphic or recording watt hour demand meter was 7.2% fast on 10% load and on a full load, which would be a 100% load, it would be about 3.3 and 4/10 per cent fast.

Q. Well, now referring to your notes again, did you make any test back on the 3rd of January, other than what you have already referred to, of the Alloys' meter?

A. On the 3rd of January—well, nothing outside of a little small synchronism check was all, with our meter and their meter. No electrical tests, or watt hour test at all, just a synchronizing check.

Mr. Carothers: That's all.

#### Cross-Examination

By Mr. Metzger:

Q. Mr. Avrill, as I understand it, you say you were only down at the Ohio's plant, according to your records, on January 3rd and January 10th. and then again on March 4, 1946, is that correct?

A. On January 3rd, January 10th, and I was also there on February the 28th, and March the 1st, and also March 4th.



(Testimony of Leonard J. Avrill.)

Q. February—the 28th of February?

A. The 28th of February.

Q. The 28th of February. And the only time that you testified [262] as to doing anything with the—you made this slight synchronization test on January 3rd, is that right?

A. On January 3rd, I made a synchronizing check on——

Q. Check—that's simply a timing to see that the two meters are working in time with the other?

A. Just a timing check of the synchronism of two reset arms on the meter.

Q. So that when each one is talking about the same half hour demand, is that the point of that, sir?

A. That's right.

Q. And on the—March 4th you made a test of the Company's recording demand meter?

A. No, that was on March 1st, I tested the Alloys'——

Q. That's March 1st.

A. The Alloys' meter.

Q. All right. Now you say you found it to be fast?

A. Yes.

Q. That is in recording more kilowatt hours than were actually being used?

A. That's right.

Q. You say you were not down there on December 31, 1945?

A. No, I was not down there at that date.

Mr. Metzger: Your Honor please, I don't like to excuse this witness entirely. I have sent to the plant for certain information and I think it will be here [263] in a very few minutes.

(Testimony of Leonard J. Avrill.)

The Court: Are you through with the present cross-examination?

Mr. Metzger: For the present, I am through.

The Court: You may step down then, and remain in the Court Room.

Mr. Metzger: Just a moment, if your Honor please.

Q. Mr. Avrill, did you make any record of the demand indicated by the City's demand meter on January 3rd? A. I do not believe I did.

Q. Did you make any record of what the City's demand meter registered on January 10th?

A. Yes, I have a reading here of the demand on January 10, 1946, of 0.6225 less times 12,000—

Q. Give me the figure over again?

A. .6225.

Q. .6225? A. Times 12,000.

Q. And as far as you know, that's the same reading as it was on January 3rd?

Mr. Carothers: That is the date you are asking about.

Mr. Metzger: No, I am asking about January 10th, he's talking about now. [264]

A. Yes, it is.

Q. As far as you know, these were the same on both days?

A. Well, as far as I know, I couldn't say. I don't know.

Q. Well, you don't know if there was any change in that time? A. I couldn't say.

(Testimony of Sam Klaben.)

A. Yes, I found it 0.6115, which would give about 7,338 kilowatts.

Q. Did you have occasion to go to the plant again?

A. Yes, I guess after the cover was repaired—or damaged and repaired—I went back to check the meter again, to see whether it—she was in good calibration. [267]

Q. And that was when?

A. That was February 18th, 1946.

Q. And what was the condition of the meter at that time?      A. The meter was in good shape.

Q. You had to do with testing this meter later on when it was taken out?

A. When it was reclaimed and brought to the shop?

Q. Yes.      A. Well, the shop man tested it.

Q. When was that, do you know?

A. Well, it was about 3-4-46.

Q. March 4, '46?

A. Yes, that's when the meter and the service wasn't reclaimed from the——

Mr. Carothers: That's all.

#### Cross-Examination

By Mr. Metzger:

Q. So, on the 4th of March, '46, the meter was taken out?      A. Yes, sir.

Q. And a different meter was installed by the City?      A. Yes, sir.

(Testimony of Sam Klaben.)

Q. A different type of meter?

A. Yes, sir. [268]

Q. Is that right?

A. That's correct.

Q. All you did was on January 17th, you made—I don't know—some kind of a test of the City meter?

A. Well, that was a complete test, I had to—it took quite a little while and I changed the bearings, oiled and serviced the main gasket and everything checked out okeh.

Q. Did you have to break the seals to get into that?

A. Oh, yes. Yes, sir.

Q. Take it all apart?

A. That's right.

Q. Well, when had similar tests like that been made previously do you know, do you have any record?

A. No, I have no record of that.

Q. Has the City got any record of it?

A. The City has a record.

Q. But you didn't check up to see—compare the results of your test and the City's previous test of a similar character?

A. No, sir.

Q. These readings in decimals like you get down, 0.6115—two readers can read a difference of two or three-tenths on the reading quite easily without either one being accused of scullduggery, can't they?

A. Yes, it has always been a practice of the meter readers [269] and the meter men to always read with the benefit toward the customer on demands in kilowatts.

(Testimony of Sam Klaben.)

Q. And your reading of .6115 was with that idea in view? A. That's right.

Mr. Metzger: That's all.

### Redirect Examination

By Mr. Carothers:

Q. This meter, when it was reclaimed, a different meter was installed and it was put in a different place, is that right? A. That's right.

Q. Placed at the outside of the plant?

A. Yes, sir.

Q. Was that the 4th of March that that was done? A. Yes, sir, the 4th of March.

Mr. Carothers: That's all.

(Witness excused.) [270]

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### ROBERT McQUARRIE

produced as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

### Direct Examination

By Mr. Carothers:

Q. State your name, please?

A. Robert McQuarrie.

Q. Robert McQuarrie, how do you spell that?

A. M-c-Q-u-a-r-r-i-e.

Q. And you're an employee of the City of Tacoma, Mr. McQuarrie? A. Yes, sir.

(Testimony of Sam Klaben.)

Q. And have been for many years?

A. Since 1927.

Q. And in what capacity?

A. In the Meter Department.

Q. As what—repairman—inspector——

A. Repair man and testing and installing.

Q. And you have had many years' experience before that?

A. I had five years before that. About 25 altogether.

Q. Have you had occasion to visit the Ohio Company's plant here, in this controversy here?

A. Yes, sir. Around—I think it was around about February—the 1st of February of '46, there was a complaint slip [271] came in that the case was damaged, they couldn't reset the demand and then they sent me down for the repair, so I took——

Mr. Metzger: I object, your Honor please, as wholly immaterial and irrelevant, there is nothing in issue as of that date.

Mr. Carothers: We expect to show that this meter cover, in addition to the seals that had been broken on the 10th, had been tampered with on the 31st.

The Court: Of course, I don't know that it would make very much difference in the final outcome.

Mr. Carothers: I don't either, your Honor.

The Court: But I'll let him testify briefly.

Q. In what condition did you find it?

(Testimony of Robert McQuarrie.)

A. Well, I found that the front part of—the square part of the glass was separated from the ribs of the meter.

Q. Well, this box is just a——

A. Yes, that's just for carrying it around.

Q. Well, you step down and point out to the Court the condition the box was in.

A. Well, this here front—this glass was separated from the glass ribs here; it was quite loose, you could shove it, and that's why you couldn't set the demand.

Q. Well, how was it attached in the first place to these?

A. Oh, these here thumb nuts—wing nuts tighten that and [272] hold it in place.

Q. Is there any sealing—or cemented?

A. Yes, it is generally sealed right around here, the first place we have to look after.

Q. Then the cover is cemented onto the sides?

A. To the ribs, yes.

Q. When you went over, was the cement broken all around?

A. Yes, all around. You could move this with your hand in different directions.

Q. And did that leave any space that you could insert any kind of an instrument or anything into?

A. It would be possible to put a piece of wire in between the ribs and this front.

Q. Now, this box, of course, shouldn't be removed?

A. That shouldn't be on that. We just put that on there.



(Testimony of Robert McQuarrie.)

Q. The cement was broken all around—did you ever have that happen to any other meter?

A. No, not to my knowledge.

Q. In your opinion, how could that happen?

A. Well, I don't know, I'm not prepared to say——

Mr. Metzger: I object, your Honor——

The Court: I believe I sustain the objection. It would be only a guess, unless——

Q. And you repaired the meter, its condition?

A. I took the glass and the cover off and put a cloth over [273] it, and took it over to Fuller's. They were the only people that we could get that could repair that type case, but we took a reading of the kilowatt hours and the demand hand before we left. We always do that every time we come in contact with a meter.

Q. Then how long were you gone?

A. Oh, about three or four hours. They said it would take quite awhile.

Q. And when you returned, what did you discover as to the meter reading—the demand?

A. Well, we found the hand had went up a little from the original demand that we found there.

Q. Did you make a notation of it?

A. Oh, yes. And then I figured that possibly my cloth had touched that demand, so I put it back to its original reading, and put the cover back on again.

Q. Did you have anything to do with machine when it was taken out in January or March?

(Testimony of Robert McQuarrie.)

A. No. Mr. Foote, the man who does the inside work, he tested that.

Q. Did you have anything to do with installing the replacement over at the plant?

A. No, I didn't.

Q. Who did that?

A. I think Ralph Thomas did that. [274]

Q. When a meter of this type—by the way, what kind of a meter is that, so that the Court——

A. Well, that's what they call a duplex meter. At that time, I think that was in there because we had two circuits—two power lines come in there. I think that's the idea there.

Q. Well, is that the usual meter that is used for——

A. That's—we consider that one of the best types made in the United States today.

Q. And if a meter is out of adjustment, what usually happens to it?

A. Well, in what way?

Mr. Metzger: Your Honor please, this is speculative what usually happens to it.

The Court: I don't see the purpose of all this testimony. I don't see the purpose of any of this now, Mr. Carothers. We are not trying this case on whether meters——

Mr. Carothers: The only question is——

The Court: ——are in or out of order.

Mr. Carothers: The only way it would be material at all, is the question of whether the Court is going to accept our meter readings or those of the

(Testimony of Robert McQuarrie.)

Company's, if it gets down to where there's—the racket clause is applicable. It's the only, actually—— [275]

The Court: Well, I haven't been trying to take a listing of the evidence with that issue in mind at all; and if it does become a question why we can give it consideration later. This question—this case isn't turning on—now upon meter readings, only incidentally.

Mr. Carothers: My only thought, your Honor, is that the Plaintiff dealt considerably on that question, witness after witness.

The Court: The issues are made by this rather incomplete and almost a defective pre-trial order, as a result of a pre-trial conference. If I could have had the information that I have had here the last two days, I would have compelled you to have narrowed the issues down specifically to what they are; but now, as it is made up, they are, as I mentioned this morning again; first, they call for a situation that arose in connection with this abrogation of the service, or this discontinuance of the service; and second, as to when, if ever, a notice was given, if a notice was an effective notice, so as to what refund would go to the City; and third, a finding or a declaration as to what rights the plaintiff might have should they desire to go back on the service. And so we are dwelling an awful lot upon incidental matters as to whether someone representing the Company, or some vandal broke into a meter, and all of those things I'm [276] not going

(Testimony of Robert McQuarrie.)

to work on this late, on this case. I'll just have to put it off for probably three weeks.

Mr. Carothers: That is all.

### Cross-Examination

By Mr. Metzger:

Q. Mr. McQuarrie, is that it? A. Yes, sir.

Q. When was it you say you found the front part of this glass loose?

A. Around February the 1st.

Q. February the 1st?

A. Around the 1st of the month, I think it was, yes.

Mr. Carothers: What year?

The Witness: 1946. We could get that from Fullers quite easily, the exact date.

Mr. Metzger: That's all.

Mr. Carothers: That's all.

(Witness excused.) [277]

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### VERNE KENT

produced as a witness on behalf of the defendant, after being first duly sworn, was examined and testified as follows:

By Mr. Carothers:

Q. Your name is Verne Kent?

A. That's right.

(Testimony of Verne Kent.)

Q. And you've been employed by the City for some twenty odd years?      A. That's right.

Q. What period were you Superintendent for the Light Department? Well, it was a number of years prior to 1944 and up to June '45, isn't that correct?      A. That's right.

Q. So you were superintendent during this squabble?      A. That is right.

Q. And as such, you took part in the negotiations of this contract?      A. That's right.

Mr. Carothers: Now, your Honor, I might say that the purpose of this testimony is just to refute Mr. O'Neil's declarations in this deposition position, and if the Court——

The Court: The Court will permit you to [278] lead him some, and that's why I consider that very material and together with these letters, and if this witness' testimony tends to throw any light on that issue, as to whether there was a mutual and voluntary modification of the contract, the written contract.

Mr. Carothers: Well, now I am speaking first of the negotiations. I gather from the Court's remarks that he is not interested in what took place leading up to the negotiation of this contract. Now he is disregarding the testimony of the plaintiff's witness in that regard, and so I——

The Court: Well, I am going to make that sweeping a statement.

Mr. Carothers: I am assuming the attitude of the Court.

(Testimony of Verne Kent.)

Q. Mr. Kent, you were still Superintendent in 1945—no, April 1944, when there was a suspension in the operation of the second furnace over a period commencing some time about the 26th of April, 1944, and going to to February, 1945, isn't that right?

A. I'm not sure of the dates but along in there.

Q. And that suspension came about as a result of a mutual understanding, which lead to writing in the form of letters and maybe one telegram, which has been introduced [279] here in evidence, is that right?

A. I don't know whether the letters have been introduced or not? I haven't——

Q. But you're familiar with the letters that took place? A. That's right. With Mr. Cole.

Q. And one of those letters is dated the——

Mr. Metzger: Our first letter was March 29, 1944.

Q. March 29th letter where you disagreed with him as to Article XIX, where it says it is to the mutual advantage of both parties and that each party reserves his right to shut down and be put back on in thirty days, et cetera.

A. That's correct.

Q. Who framed that letter?

A. Well, I wrote it.

Q. It was signed by Commissioner O'Neil?

A. That's right.

Q. All the negotiations and arrangements leading up to that were handled by you, is that correct?

(Testimony of Verne Kent.)

A. Yes, between myself and Mr. Cole of the Ohio Ferro-Alloys Company.

Q. As far as you can recall, did Commissioner O'Neil take any part in that at all?

A. No, I don't believe he did.

Q. That was after he had been defeated for office, was it not? [280]

A. Well, I'm not sure of that. Maybe it was. I haven't checked those dates.

Q. Now, in connection with the correspondance, the exchange of correspondence at that time, was there any oral conferences of any kind, with Ohio's representatives?

A. In regard to this shutdown?

Q. Yes, yes.

A. There were several discussions with Mr. Cole, who was then local manager; and I believe there was a telegram to Mr. Cunningham or something, on the proposition—or a telephone conversation, I don't recall which.

Q. But those discussions were with you?

A. That's right.

Q. And Mr. Cole?           A. That's right.

Q. Mr. Cole.           A. That's right.

Q. And perhaps, Mr. Boyle sat in on one of those——

A. Yes, sir. Mr. Boyle was in on it.

Q. And was there anything special, outside of what was put on paper, that has to do with this shutdown?

A. No, the whole idea was, if possible, was to



(Testimony of Verne Kent.)

give advance permission, as it were, to come back on—they could come back on, that's what they were interested in—if they were to shut down, whether or not the City would [281] agree to take them back on; and that was the purpose of that letter to say that we would agree to it, outside of the contract, if that was possible—if possibly it could be done.

Q. And in the correspondence each side saved their rights?

A. I think it was so stated in the letter, wasn't it?

Mr. Carothers: I think that is all.

The Court: Is this your handwriting, or a photographic copy of your handwriting on this Plaintiff's Exhibit 8. A notation on the bottom of it?

The Witness: This isn't my writing, no.

Mr. Metzger: I think that was put on in the East, your Honor.

The Court: Oh.

Mr. Metzger: It's taken from—the explanation for it is contained in another letter, which is in evidence. I would admit that was indorsed in the East.

The Court: Very well.

Mr. Carothers: I don't know if the Court understands this rachet clause arrangement.

The Court: None too well.

Q. Mr. Kent, will you explain to the Court, the rachet clause that is applicable to this case?

A. Well, the rachet clause—my understanding

(Testimony of Verne Kent.)

of it, is that this demand hand is pushed up by a point, and [282] it—the same as a ratchet on a spring or anything else—the hand will not come back unless it is reset manually. And the contract provides that the contract demand—or the actual demand, as recorded by the meter will determine the billing demand, whichever is the highest. So that ratchet clause refers to this hand going up and not going back at all, and the billing is determined on the highest setting of that hand throughout the whole year, while it's stilled and reset each month, on the monthly reading to equalize to the highest demand at the end of the year under the contract.

The Court: Well, when did this ratchet provision of the contract come into effect, on this contract? Did you make use of it at all, at any time on the first load, the 65,000? Was the ratchet provision of the contract——

The Witness: The ratchet provision is that the demand stays up and doesn't come down at all under the contract, for the whole year.

Mr. Carothers: On the first furnace?

The first furnace or the second furnace also.

Q. Now, but you didn't get the Court's question. As far as the ratchet clause on the first furnace, that has no application at all, because they have to pay through the [283] ten years.

A. That's right on the last demand, it doesn't apply.

Q. All right, now as to the second one, that is what the Court is concerned with.

(Testimony of Verne Kent.)

A. Well, now as to the second one, it doesn't apply there either, if the second furnace operates over a year, or for two years, and so forth. It is only when it shuts down—shuts down and those months in excess of a year are prorated. Then the ratchet clause is ineffective so you can prorate that.

Q. On an annual basis; in other words——

A. On an annual basis.

Q. In other words, if you ran three months beyond the twelve-month period, whether it is the first, second, or third time that the furnace is operated, for that three months, the ratchet clause would apply. A. That's right.

Q. The highest billing demand, the highest actual demand, is what you would charge him for, is that right?

A. Well, for the twelve months and for the three months, you would take—that would be at the seventeen fifty a kilowatt year rate, but you would prorate that and only charge him for three months, or \$1.46, I believe it figures, about 46c per kilowatt per month. Those three months would be prorated; and in order to do that under [284] the contract, you have to drop this ratchet clause.

The Court: Well, let me ask you this, and see if I can clarify this in my own mind. This second furnace was entitled to 6,000 kilowatts of energy, and they assumed that obligation to pay for that.

The Witness: That's right.

The Court: ——and the City had the obligation of furnishing it——

(Testimony of Verne Kent.)

The Witness: That's right.

The Court: Even though they might only use half of it, or might shut down half the time.

The Witness: That's right.

The Court: But the City was compelled to stand ready to serve 6,000.

The Witness: That's right.

The Court: And so the minimum charge made under the contract in the first year was at least 6,000. Is that right?

The Witness: On the second block.

The Court: On the second block, yes, let's forget the first one.

The Witness: That's right.

The Court: But suppose that some month in that first year, they went to 7,000 on the second block. Did that fix the rate for the whole year, or for a month?

The Witness: For the whole year.

The Court: But that still didn't involve the ratchet clause, or did it?

The Witness: No, it doesn't involve the ratchet clause.

The Court: It's not involved there.

The Witness: No, except for the hand is a ratchet device.

The Court: Yes, but if the contract had gone straight through, this one, and there had been no shutdown, would there ever have been any occasion to invoke what you call the ratchet clause?

The Witness: No, no there wouldn't.

(Testimony of Verne Kent.)

The Court: If, on the other hand, the contract had been suspended, either by reason of its provisions, or by mutual consent, and then resumed, where would the ratchet clause have gone into effect on this?

The Witness: Well, they would be permitted under the contract to drop the second block, which may have been the 6,000 or 7,000, which the demand shows that, so that the ratchet clause would come into effect to put it back to the original contract demand of 6,500 kilowatts.

The Court: Well, that was being used all the time, or being charged all the time.

The Witness: That's right, that's right, but it's all on the same meter, all recorded on the same meter.

The Court: For both furnaces?

The Witness: That's right.

The Court: I see. That rather clears it up for me.

Mr. Metzger: Your Honor, please, I think you have one or two of the exhibits there, I would like to interrogate the witness about.

#### Cross-Examination

By Mr. Metzger:

Q. Mr. Kent, showing you Exhibit 8, is that the letter of which you claim to be the author, although signed by Mr. O'Neil? A. Yes, that's correct.

Q. Well now, I don't have a copy of it, but in that letter you first said that you wouldn't agree

(Testimony of Verne Kent.)

with the Company's contention that they were excused from operating the second furnace under Article IX of the contract, is that right?

A. IX or XIX, I don't remember.

Q. XIX, yes. [287] A. That is right.

Q. Then you said, "However, the situation here—the power situation is critical. The City is being compelled to buy large blocks of power, and it will be to the City's advantage to let you shut down.

A. That's correct.

Q. And that was the fact?

A. That was the fact.

Q. And the shutdown was to the City's advantage?

A. About \$900 a month, as I recall.

Q. All right, and you were very glad to be relieved temporarily of the obligation of furnishing the power for the second block?

A. That's correct.

Q. And you were—but you reserved the right to compel them to go back on again whenever you wanted them to. A. That's right.

Q. And they had the right to come back on whenever they wanted to? A. Yes.

Q. And this whole arrangement was intended to be outside of the contract as a special arrangement between the two parties?

A. That's correct.

Q. And was entered into on that basis and that was your [288] understanding of it?

A. That is correct.

(Testimony of Verne Kent.)

Q. And at the same time when you made it, you weren't saying to Ohio if you accept this you have got to give up your claim under Article XIX. You said they could preserve their right under Article XIX.

A. That is right. I don't know whether I said that, but I had no objection to it.

Q. I mean, that was the understanding?

A. Yes.

Q. And then, Mr. Kent, I show you another letter, a subsequent letter of April the 11th. Are you also the author of that letter, although it is signed by Mr. O'Neil?

A. Well, I am not sure about this letter, whether I wrote that or not.

Q. Well, it is not particularly material. You are not sure whether you wrote that letter or not?

A. No.

Q. But you have read it now, but that letter is in accordance with your understanding and it confirms your previous letter of March 29th, does it not? A. I think so.

Q. And so far as the City is concerned, when the Ohio did shut down on or about April 26th, they were shutting [289] down under this special arrangement that you had proposed and O'Neil had signed in the letter of March 29th. A. Yes.

Q. That's right? A. That's right.

Q. And neither side was to be in any way penalized by that shutdown?

A. I believe that is correct.



(Testimony of Verne Kent.)

Q. That is correct, too.

A. That is correct.

Q. It was to be wholly outside of the contract?

A. That is right.

Q. That's right, and so for the purposes of the contract then, it was just the same as though Ohio's taking of the second block of power had been continuous, and that shutdown not count?

A. Well, I wouldn't say that.

Q. Well, that is the effect of your statement, isn't it?

A. No, I don't believe so. I don't agree on that.

The Court: Now why don't you agree with it?

The Witness: Well, this was just an agreement to shut down outside of the contract, without agreeing to what the contract meant, and giving them permission—advance permission, if it was permissible, to allow them [290] to come back on again. That's all we were trying to do.

Q. There was a shutdown outside the contract for the mutual advantage of both parties?

A. That's right, for the mutual advantage of both parties.

The Court: Well you, representing the City, did you mean to say that they could avail themselves of the provisions of Article XIX of the contract, where a condition arose that was beyond their power?

The Witness: Well, at the time this agreement was made they didn't know that they were ever coming back on.

(Testimony of Verne Kent.)

The Court: Well, some of this correspondence says specifically, whether it's a letter you dictated or somebody else, that you do not recognize a right to consider the situations enumerated in Section 19—of Article XIX of the contract, and you do not permit the cessation of service based on Article XIX.

The Witness: That's right.

The Court: Well now, you stated to Mr. Metzger that you still recognized the right of the Company to claim the benefits of Article XIX, in this——

The Witness: Well, I was looking at it from this angle, who am I to judge, but in my opinion the reason given didn't apply under Section 19.

The Court: You mean the reasons the Company had given.

The Witness: The reasons that the Company had for the shutdown.

The Court: Well, as a matter of fact, from your statement and the other testimony that has been given here, the City was actually short of power at the time?

The Witness: That's correct.

The Court: And the Company was actually long on power, because of conditions that had arisen that the City had nothing to do with.

The Witness: That is right.

The Court: And the parties concluded that it would be mutually advantageous to suspend the operations as to the second furnace?

The Witness: That's right.

(Testimony of Verne Kent.)

The Court: That is all, I just wanted to see if that was his views. Apparently it is more or less the view of both parties.

Mr. Metzger: That's all I have. Oh, one other question, Mr. Kent.

Q. As a matter of fact, since the inception of this contract, the City has never had occasion to, and never has, billed Ohio for any higher demand than the contract demand, [292] is that correct?

A. I couldn't state.

Q. As long as you were Superintendent of Light that was the case. A. I believe it was.

Q. Is that right?

A. Well, I couldn't definitely state, because I haven't the demand before me.

Q. Well, so far as you know, the ratchet clause never came into operation, and never has been put in operation? A. That is right.

Mr. Metzger: That's all.

The Court: Anything further, Mr. Carothers?

### Redirect Examination

By Mr. Carothers:

Q. You don't know whether it ever exceeded the 12,500 demand? A. No, I don't.

Mr. Carothers: That is all.

(Witness excused.)

The Court: Anything further, Mr. Carothers?

Mr. Carothers: The Court doesn't want to [293] hear any testimony regarding the negotiations lead-

ing up to this. We were going to call Mr. Jones that had to do with the drafting of the original contract, but I take it from the Court's remarks that the contract speaks for itself.

The Court: It generally does——

Mr. Carothers: We rest.

The Court: No, I don't care to hear further testimony as to the various steps that led to the contract.

Do you have any rebuttal, Mr. Metzger?

Mr. Metzger: Yes, we would like to have a short rebuttal to the City's testimony.

The Court: How many witnesses?

Mr. Metzger: I think one.

The Court: It is long past adjourning time. Of course if I adjourn this case I adjourn it for about a month. Now that is the situation, because I put it on my calendar as a day and a half case. I set other cases and my calendar is becoming involved.

Mr. Carothers: Your Honor, we would like to finish up, this evening.

The Court: I am afraid you won't be able to do that, but if you have got a short rebuttal on something, put them on right now. [294]

Mr. Metzger: Mr. Farmer, please.

### MARVIN FARMER

recalled as a witness on behalf of the Plaintiff, was examined and testified in Rebuttal as follows:

(Testimony of Marvin Farmer.)

Direct Examination

By Mr. Metzger:

Q. Well, Mr. Farmer, there has been some testimony here relative to the condition of the City's meter over at the plant, and the state of the seals and the glass cover on it. You heard the testimony here from the City's witnesses?

A. That is correct.

Q. That's the same type of meter or perhaps the same meter that the City installed over there?

A. That is correct.

Q. In '42, what was the condition of the seals on that meter, as to whether they were intact or had been broken?

A. Well, it seems to me like they was broken, and I am very sure that they was broken, at least part of the way around, due to vibration.

Q. In '42? A. Yes, sir. [295]

Q. Now, when you came back to the plant in—after war service, and you got back there later in December of 1945, then what was the condition of it?

A. It was very serious. It was broken all the way around.

Q. Broken all the way around on December 27th?

A. Yes, that is, the seals were broken.

Q. The seals were broken? A. Yes, sir.

Q. And what about the glass being separated or loose?

(Testimony of Marvin Farmer.)

A. Correction, the seals—I mean by the glued seal, as to air getting in, and not the company's seals that they put on with a stamp.

Q. When you talk about seals now, you are talking about—— A. The glued seal.

Q. The adhesive on the glass, from the front plate to the side plate? A. Yes, sir.

Q. And that was broken in December, 1945?

A. Yes, sir.

Q. How long did that condition obtain? Until the meter was replaced?

A. No, they repaired that meter some time in the early part of January, I believe, in that account, they repaired the glass.

Q. They repaired the glass, did they? [296]

A. Yes.

Q. Mr. McQuarrie said he repaired it on the first of February. Would that be about the right date? A. Approximately, yes.

Q. Now, where was that meter located?

A. On the panel board in the control room.

Q. Well, how close is that—how far above the ground,—the floor level?

A. Approximately three feet.

Q. Three feet. Was it subject to any—being jarred by any doors or otherwise?

A. Yes, the door would come into contact with it if it was slammed back hard.

Q. Now, who put—who installed the meter at that particular place?

A. That, sir, I do not know.

(Testimony of Marvin Farmer.)

Q. You don't know.

A. It was installed when I came to work.

Mr. Metzger: Do you admit the City installed that meter?

The Court: Oh, I assume they did. It isn't a matter of——

Mr. Metzger: All right, that is all. [297]

Cross-Examination

By Mr. Carothers:

Q. You didn't report the condition you found on these two occasions to the City, did you?

A. Which one was that?

Q. Well, either the loose frame or the seals being broken.

A. I wouldn't say whether I did or didn't because I don't know.

Q. Well, then you could say whether you remember whether you did or not, can't you?

A. I imagine I called it to the manager's attention. We talked about various things, a default every time we read the meters. I wouldn't say.

Q. You mean to say the meter man isn't telling the truth when he stated he discovered it for himself on the 31st of January?

A. No, I wouldn't say that he isn't telling the——

Q. Then you didn't report it to him?

A. Well, I won't say.

Q. And you didn't in the first part of January



(Testimony of Marvin Farmer.)

when you discovered the glass loose, you didn't report that to anybody, did you, either? I mean the seals broken?

A. I didn't discover it until after they called my attention to it.

The Court: Is that all, Mr. Carothers? [298]

Mr. Metzger: I would like to ask one other question.

### Redirect Examination

By Mr. Metzger:

Q. Mr. Farmer, Mr. Robinson when he was on the stand said that on January 31st—or December 31st, 1945, when he was at the plant, and he found a City's meter reading about 7500 kilowatts, and you told him that Ohio had dropped to one furnace—yes, one furnace operation, he said that you told him that Ohio's meter was too high, too. What is the fact, did you make any such statement?

A. Not to my knowledge.

Q. Well, what was the fact, did the Ohio's meter register too high at that time?

A. No, they hadn't in any of the periods that I inspected, which was throughout the whole month.

Q. Any statement you made to Mr. Robinson at that time was understood by him----

Mr. Carothers: Well, now, just a minute.

Q. (Continuing): —to be—that Ohio's meter was too high——

The Court: I think I will have to sustain the objection, Mr. Metzger, to that. I don't see how he

(Testimony of Marvin Farmer.)

could attempt to say. I wanted to ask you this question: [299] You remember talking to Mr. Robinson, do you?

The Witness: On the 31st?

The Court: Of December.

The Witness: Of December, yes, sir.

The Court: Do you remember telling him that the second furnace was out, entirely?

The Witness: Yes, sir.

The Court: And that was, of course, your discussion as to the meter reading?

The Witness: Yes.

The Court: Had you ever told him that before?

The Witness: No, sir, I never came until the 27th of that month.

The Court: Of December?

The Witness: Yes, sir, back with the company.

The Court: But you didn't tell him then. You told him on the 31st?

The Witness: That was the day he arrived there.

The Court: When he read the meter?

The Witness: Yes, sir.

The Court: That's all. [300]

#### Recross-Examination

By Mr. Carothers:

Q. Were you instructed to tell the meter reader to——

Mr. Metzger: Object as immaterial and irrelevant, whether he was instructed or not.

The Court: Objection overruled.

(Testimony of Marvin Farmer.)

Q. —to instruct the meter reader you were shutting down the one furnace permanently by any of your superiors? Were you given any instructions along those lines?

Mr. Metzger: I further object. He has never said anything about permanently.

Mr. Carothers: I think it is material.

Q. Were you given any instruction to tell the meter reader that you were through operating the second furnace or anything to that effect?

A. We had talked about it.

Q. Well, now——

A. And that is—at that time was one of my responsibilities.

Q. To notify the City when you are going to shut down your second furnace?

A. I was more or less responsible in a certain extent to that responsibility, yes.

Q. You didn't tell Mr. Robinson, though, to notify the Commissioner or the Superintendent, or anybody else that the Ohio Company was not going to operate the second [301] furnace any more, did you?

A. No, sir.

Mr. Carothers: That is all.

Mr. Metzger: That is all.

(Witness excused.)

The Court: Is that all the rebuttal, Mr. Metzger?

Mr. Metzger: Yes, sir.

The Court: Mr. Carothers, you stated the other day and I suppose your situation is still the same,

that you will cease to be official Corporation Counsel for the City after tomorrow?

Mr. Carothers: Tomorrow is my last day. Mr. Boyle will take care of it, I think. I would like to argue the case, your Honor.

The Court: Well, I would really like to have an argument on both sides at some later date. It's too late to attempt it this evening. Everybody is tired and worn out.

I might set this down for some time—it will be at least two weeks, unless my calendar on Friday should blow up. That hasn't been the history for the last three weeks of these calendars. [302]

Mr. Metzger: Your Honor please, I hate to be a continual pest and nuisance about these assignments. When last Thursday you announced that the argument of the P.U.D. case against Longview Fibre would be continued to May—Tuesday, May 20th, to my mind at that point was wool gathering. Personally May 20th is an undesirable date, and I do not expect to be in the city for that time. Now I could take it up——

The Court: You take it up with counsel on the other side and get a stipulation, either approved by a letter informally or a formal.

Now on this case I think while the facts are fresh in the Court's mind, and in the minds of counsel, I see my calendar for Friday—I have four or five cases set, but apparently only two habeas corpus cases will be heard, so that I can hear this at 2:00 o'clock on Friday.

Mr. Boyle: Your Honor, it has just occurred to me that Mr. Carothers out of the case, that I have a conference with some railroad attorneys that has been postponed once, and it is set for next Friday.

The Court: Well, while this matter is fresh, and I have got a place I want to make a disposition of it, and railroad attorneys will certainly understand a matter of this significance that is in court, and they will have [303] to further continue their conference if you are an essential part of it, Mr. Boyle.

Mr. Boyle: Do you think we can dispose of it in the morning and be through in the morning?

The Court: I think we can.

Mr. Metzger: I understood it was 2:00 o'clock in the afternoon.

The Court: No, the Clerk just advised me that these habeas corpus cases are at 2:00 o'clock in the afternoon, and the argument should not require over 45 minutes on a side.

I might help you somewhat in argument by pointing out to you briefly what the Court considers is the central theme of this whole story, and that is:

First, as to whether there was an actual suspension under the terms and provisions of this contract, or whether there was a temporary suspension by reason of a mutual understanding between the interested parties, and I am inclined to the view that it was a temporary suspension, followed by a resumption. I mention these things so it will aid you in preparing your argument.

Then when the resumption occurred, if the Court should ultimately find that, whatever the liabilities

and rights of the respective parties were for a discontinuance, [304] they must be found in the contract, and brings us to the question of the notice, where they proposed to relieve themselves from liability.

And then the notice that is given here, and followed, not within 30 days or at the end of 30 days with a suspension of use, but a continued use through the months.

Now what was the situation. When was, if ever, a notice given in accordance with the terms of the contract? That's what I want you to give consideration to,—the first time, and the only thing we have in this record, though both parties do know a great deal more about the other than probably the cold record shows, but there was an open and shut statement made on December 31st that the—that this furnace is not running.

Now, then, with those—those are the things I want you to center on. Of course, if there was a complete suspension of operations with no thought of a resumption when conditions confronting the two parties changed, then we have for determination this question of 12 months of continuous service when a resumption took place, and a charge for 6000 kw's. at least. I am not much inclined to that position right now, but I don't want to make up my mind upon the matter too much, [305] but if I were to decide the case now, and this going quite a long ways, but it might help you in shortening your argument and a lot of labor that would be lost later,—if I were compelled to decide the case immediately,



or you were to submit it to me, and I were to make my decision, I would decide that the contract entered into in 1941 for the second furnace was continuously in operation, except insofar its operations had been mutually suspended outside of the terms of the contract, until December 31st, 1941.

Mr. Metzger: December 31st, 1945.

The Court: '45, yes, and that largely disposes then, of course, what was paid. If anything was paid after that in January or in February it would be in the nature of a credit or a refund.

Then we have the other question left here, which is as to the rights of the plaintiff to resume his operation, and on that issue if I were deciding it now—though I am still open for persuasion and a change of opinion, I would hold that their status would be that that would have resulted had they formally by the 30-day notice suspended the operation and relieved themselves, and the only way they could get back would be by the terms of the contract, which was when the City saw fit in their own discretion, to let them come back. [306]

Now those are my present feelings.

Mr. Metzger: Thank you, your Honor, that is Friday morning?

The Court: Yes.

(Whereupon adjournment was taken.) [307]



[Title of District Court and Cause.]

COURT'S ORAL DECISION

(May 2, 1947)

(Following Argument by Respective Counsel)

The Court: I think that I am prepared at this time to make a disposition of this cause, insofar as this Court is concerned. I am not going to endeavor to give a general summary of the background and the history of the situation that gave rise to this problem. It's fairly complete in the record and pre-trial order, together with admissions made during the course of the trial, eliminate many things that might have been issues upon which the Court would ordinarily be required to make a finding.

It is, it seems to me, appropriate to give some thought before attempting to apply the facts to the situation that did arise, to give some thought to the conditions that prevailed in 1941 when this contract was in contemplation and later executed, which was on the 21st [308] day of March, 1941.

By the very nature of the contract, it is evident that there were extremely extensive conversations had before a contract of this magnitude would be entered into. The City of Tacoma, of course, being a governmental agency, did not have the same high degree freedom in its actions that it would had it been a private corporation, and the contract would have to be drawn with a much greater degree of particularity in order to fully express the agreement of the parties. From what took place after

its execution, proceeding under its provisions, it's evident that the parties did not anticipate all the situations and conditions that would arise, and that is what has given rise to this lawsuit.

Now in 1941 when these steps were being taken, when the contract was executed, the federal government had engaged in its unusually extensive defense program. By December the 7th it was actually engaged in war. Congress passed the Second War Powers Act very soon thereafter and gave the Chief Executive probably the greatest powers ever conferred upon a President in the history of the United States. All manpower and all material wealth and all agencies of production came within the purview of those granted powers, and they were being exercised as the need required, through [309] what were called "directives," or orders of one kind or another. The parties when they executed this contract couldn't have had that situation in mind, although they might have anticipated that there would be some great change, and they undoubtedly—the plaintiff in this action undoubtedly looked to the government as its principal buyer, either directly or by reason of its activities in other fields. After December the 7th, the government had the power and exercised it, to direct almost everything in a material way, and it certainly made directives here that directly affected the products produced by this corporation.

If I were left to the position where I would have to make a determination as to whether this cessation of use of power from the second unit occurred

within the provisions of Article 19 of this contract I would be inclined to find that they did, but I feel that under the evidence as it has been submitted here, I do not need to do that, because clearly in this large exchange of correspondence and doubtless personal interviews, particularly as they are supported by the testimony of Mr. O'Neil who was then the elective head of this city light division of the government, and the then superintendent, Mr. Kent, a condition had arisen by reason of this war situation, and the tremendous [310] unprecedented demands for electrical energy that the city found itself in a position where it could not, without loss to itself, meet its obligations in supplying power. I think there was some testimony from some witness, or else in the deposition, that they had to go outside and buy power from the Bonneville Administration, but the Court takes judicial notice if the facts are not, I know that the rate fixed for Bonneville power is \$17.50 a kilowatt year. So, of course, buying power at that rate, and selling it and furnishing the facilities for carrying it to the unit where it was sold, couldn't be a profitable venture for the city. And the parties undoubtedly, both of them, found themselves in a difficult position where it was to the mutual advantage of both to suspend the operation of the provisions in the contract concerning the furnishing of the second block of power—an odd situation, but for reasons of their own, each of them were just as anxious as the other that this obligation, the city that the obligation to furnish power and the company the obligation to pay for

it, be suspended, because it meant a financial loss to both of them and whether it was technically within the power of the city commissioner and the superintendent of light to enter into such a special agreement or not, I feel is beside the question. It was an emergency situation and [311] clearly grew out of the war, and the various regulations that came about, and there was a mutual modification of this contract as evidenced by the letters and the oral transactions between the parties.

Now, having determined there was a mutual suspension of it, rather than an alteration resulting in a discontinuance, then we come to the question as to what the liabilities are, or what relief, if any, should be granted to the plaintiff herein.

It's true that the defendant city took the position that through all of their early negotiations, as far as the correspondence at least is concerned, that they were making no suspension under Section 19 of the contract, and the plaintiff took the position that they were seeking a suspension under that section. The suspension occurred, and it occurred independent of that by reason of mutual agreement of the parties, and thus resulted to that extent in a modification of this contract.

It is very evident that the city, when it had surplus power, it expected to sell this block of power again. It is likewise very evident that when the plaintiff, the Ohio company, had a market for their output they expected to utilize the machinery they had to operate their second unit, and that situation did occur along in [312] 1945, was it? Now

the resumption of that power was again in substantial measure outside the strictly formal provisions of this contract, but when it was resumed the defendant City took the position that it was a new beginning, and therefore there would have to be twelve continuous months of payment, whether there was twelve months' use or not. The Ohio Company, plaintiff took the position this was just a resumption following a temporary and mutual discontinuance, and the Court so finds. That being a fact, then we get to the more literal terms of this contract, if the Ohio Company expected to relieve itself, at any time following this resumption in February, 1945, it would have to comply with the provisions of the contract for such relief.

The evidence indicates that there was a considerable discussion between the parties throughout the summer, and as we get up into the latter part of 1945, the corporation, evidently with an idea of compliance with termination, sent this letter—I have forgotten the number of it so I shall not refer to it directly, in August, however, of 1945, saying that they expected to discontinue the use of power but not within 30 days from this date or any particular time. Notice was defective because it was uncertain. However, the Court will find it was sufficient to give some warning to the [313] City, and without attempting to detail the record as here made, matters began to reach a more or less critical point. The City continued to bill on its theory that there were twelve months during which the Ohio Company would have to pay the full six thousand. The Ohio

Company, after 30 days following their notice, did not shut the furnace down. Intermittently, they had it down and up, and that condition continued through—or at least up until November 24th, I think it was, 1945. No further notice was given, but protests were being made when billings occurred in—if I am correct, in October and November. They were ignored. There was some one letter gone back once and then they were ignored, and the billings continued and the payments were made, because they had to be made under the existing arrangement or there would be a forfeiture of the deposit that had been provided for and with the wisdom and good judgment in a contract of this magnitude when the contract was first entered into. At any rate,—and here is where the—while this is an action at law, it is nevertheless controlled substantially by the equitable situation as disclosed by the evidence, and the Court is put to the position of making a finding as to when the City actually had notice. Well, they had definite and complete notice by the end of December of 1945. True, the meter reader is not an official who [314] has discretionary powers in matters of this nature, but from what had occurred in the way of at least indirect notice to the City by the protests that were made month after month, and the inference that the Court draws and I think it's a logical one that the meter reader who was an employee of the city, reported to his superiors and it did reach those in authority, but they had taken the position that the twelve months, irrespective of what was done, must prevail, and the



Court has found that that was not the fact, but I shall find that by reason of all of the things that are disclosed by the record in this case, that the City was fully forewarned and that there was a sufficient compliance, or at least the City would be now estopped from denying a compliance on January 1, 1946, and that the payments that they collected for January and February for this second unit, were payments in excess of that which they were legally entitled to, and the plaintiff is entitled to a credit in the amount there involved.

Now, then, as to the other feature of this case, the declaratory judgment, it's my interpretation of this contract, growing out of the existing situation following its alteration concerning the second unit, that the company can only go back on the use of power when and if the City sees fit to put them on, under the provisions of [315] Section 10 of the contract, and I think it's the third paragraph—that is, that there is no compulsion now for the City, automatically, whenever the demand is made, to furnish power. They are relieved from that, unless they find themselves in a situation that the contract mentions, and see fit to negotiate for the sale of this second block of power. When such occurs, the plaintiff company will be in a position that they were at the beginning of the taking of this power. They go on not for a month or two months, but they go on as I interpret this contract, for a full period of twelve months; that the position that the city took concerning a new taking, for which they have been billing, and the obligations that they have asserted as



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against the plaintiff to which the Court has granted relief, will now prevail; that the suspension that occurred on January 1, 1946, concerning the use of power for the second unit, is a suspension of such a nature that it now gives rise, whenever there is a mutual agreement between the parties, to a taking that presents the obligation of taking for twelve months on the contract rate.

Of course, I do not mean to imply at all that the city or company couldn't mutually agree to again modify or change the contract, but since I am called upon to interpret and construe the contract as to a [316] contingency that might arise, or a situation that might arise, that would be my construction of it.

Now I think I have covered everything that is involved here. If I haven't, why——

Mr. Boyle: I think, your Honor, there is just one question, and that is the actual demand occurring in the months of February and January, after the discontinuance. There is a discrepancy between the sixty-five hundred in the testimony, I think, up to seventy-five hundred.

The Court: I did not think that was an issue here; that that would be covered by your contract. Your contract—if the one unit had been the only one that went on, because I made a finding that there was only the one unit on, and the provisions of the contract covered that, and that doesn't mean that

the payment should be based on a 6500 kw., if there was one unit that was using more than that.

Now, if you mean that I should make a determination as between the readings of the different meters——

Mr. Boyle: That was an issue, I think, your Honor.

The Court: Well, I would hold in that regard that the readings on the City's meters would be controlling, and payment would have to be based and made upon [317] those meters. There is no showing here that those meters were defective, nor that they should be disregarded and the readings on the company's meters accepted. I think the Court almost has to take judicial notice of the fact that when a public service or semi-public service is furnished under a measuring system of any kind, the party who furnishes it seems to have the—be in the driver's seat.

Mr. Metzger: That's how they are, your Honor. I will grant you that.

The Court: I appreciate that sometimes in the reading of my own water and electric meter, and I shall make that finding.

Now you may submit your findings whenever it is convenient to the parties. I do not want to fix any definite time unless you feel that I should.

Mr. Metzger: No, I think we will be able to work out something.

The Court: And if you are in doubt as to what the Court found, the Court Reporter can get it out at the request of the parties.

Mr. Metzger: I would like to ask now for your Honor's decision to be written up. I am asking that the Court's decision be transcribed so we will have that.

The Court: Yes, it might save you some little [318] time in preparing the findings.

Mr. Metzger: Yes, your Honor.

### CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,

Official Court Reporter. [319]

DEFENDANT'S EXHIBIT A-1

November 6th, 1945

Airmail

City of Tacoma,  
Department of Public Utilities,  
Light Division,  
Tacoma, Washington.

Gentlemen:

You will please take notice that in payment to you this date of the sum of \$18,247.26, being the amount charged for electric current furnished during the month of October, 1945, against the undersigned The Ohio Ferro-Alloys Corporation, under a certain power contract between said Company and the City of Tacoma is not paid voluntarily.

From the information which we have it appears to us that the charge made against our Company is not in accordance with the terms of the contract, but inasmuch as the City declines to proceed with the furnishing of power under the contract unless our Company accepts the City's interpretation of the contract, we have no option but to make payment under protest and with the distinct avow that the whole amount is not due to the City.

Very truly yours,

THE OHIO-FERRO ALLOYS  
CORPORATION,

/s/ L. G. PRITZ,

President.

LGP

EMR

[Endorsed]: Filed September 5, 1947.

## PLAINTIFF'S EXHIBIT No. 5

Contract Between City of Tacoma, Department of Public Utilities, Light Division, and The Ohio Ferro-Alloys Corporation.

This Agreement, executed on March 21, 1941, between the City of Tacoma, Department of Public Utilities, Light Division, a municipal corporation in the State of Washington, hereinafter called "the City" and The Ohio Ferro-Alloys Corporation, a corporation existing under and by virtue of the laws of the State of Ohio, with its principal place of business in the City of Canton, Ohio, and authorized to do business in the State of Washington, hereinafter called "the Corporation".

## Witnesseth

Whereas, The City owns and operates an electric power system comprising both hydro and steam generation, with suitable standby interconnections, and is serving customers in Tacoma and its general vicinity in Pierce County, Washington, and

Whereas, the Corporation now intends to construct, operate and maintain a plant in Tacoma, at 3002 East Taylor Way, for the manufacture of electro-metallurgical products, and the Corporation has requested the City to supply the power required for the operation of such plant, and

Whereas, the City has determined that a sufficient quantity of power will be available through



Plaintiff's Exhibit No. 5—(Continued)

its own generating facilities, or through standby interconnections, for the performance of this contract, and

Whereas, all acts, things and conditions necessary under law and the Charter of the City of Tacoma have been duly done, performed and complied with to make this agreement the valid and binding obligation of the parties hereto;

Now, therefore, the parties hereto do mutually covenant and agree as follows:

1. Term of Contract: This contract shall continue in effect for ten (10) years from the date of its execution.

2. Construction of Plant: The Corporation agrees promptly upon the execution hereof to cause the construction at the above mentioned site of a plant to manufacture electro-metallurgical products of the electric furnace and such related materials as may be necessary or desirable for its processes or products. The manufacture of chlorine will not be permitted under this contract. The Corporation agrees that such construction shall begin at once and that it will be continued with diligence so that the plant shall be completed on or about July 31, 1941.

Upon completion the plant shall be capable of using 6,500 kilowatts or more of electricity. Should such construction fail to be promptly or diligently continued, the City shall have the right to cancel this contract upon thirty (30) days notice in writing to the Corporation, except the contract shall not

## Plaintiff's Exhibit No. 5—(Continued)

be cancelled if and while such construction is prevented, delayed or impeded by reason of injunction, strike, riot, invasion, fire, accident, acts of God or the public enemy, war in the United States, Governmental regulations, orders or proclamations, priorities, laws, mobs, rioters, transportation difficulties, or other causes beyond the control of the Corporation.

In the event of delay in construction due to any cause specified above, the Corporation agrees to resume construction and diligently continue the same to completion of said plant as soon as reasonably possible.

The Corporation shall give the City not less than thirty (30) days' advance notice in writing stating the anticipated date of the completion of said plant.

3. Sale and Delivery of Power: The City shall sell power to the Corporation, and the Corporation shall secure all its purchased power from the City as hereinafter provided. The Corporation may, at its option, generate by-product power, solely for its own use, but such generation shall in no way decrease the contract demand or the rate per year, both hereinafter provided for. The City shall deliver power to the Corporation and the Corporation shall pay for power in accordance with the following Contract Demands:

(a) The City shall deliver to the Corporation's property line, at a point mutually agreed upon, nominal 240 volt, three-phase, 60 cycle power for construction purposes, not to exceed 50 KVA. Upon

## Plaintiff's Exhibit No. 5—(Continued)

completion of construction this connection is to remain and will be used to secure a minimum of 15 kilowatts of emergency power for certain plant auxiliaries.

(b) From the date of initial delivery, as hereinafter defined, the City shall make available to the Corporation, at or near its property line, at least six thousand five hundred (6,500) kilowatts of firm power at nominal 13,600 volts, three-phase, 60 cycles, in addition to the emergency power referred to above. This 6,500 kilowatts of power shall be known as the contract demand. The City shall install sufficient capacity in its transformers, switches and lines, so that power inputs of 7,500 kilowatts may be taken by the Corporation without injury to the City's facilities. The City shall provide additional facilities, of ample capacity, for a second unit upon six month's written request from the Corporation giving adequate assurance that expansion is contemplated.

(c) The contract demand may be revised as hereinafter provided but in no case shall it be less than six thousand five hundred (6,500) kilowatts.

The date of "Initial delivery," is hereinafter defined as the date upon which the plant is completed and equipped to use six thousand five hundred (6,500) kilowatts of electric energy but it shall not be later than about July 31st, 1941 unless the construction of the Corporation's plant shall have been delayed, prevented, or impeded for any cause set out in Section 2 hereof, in which case the date of

## Plaintiff's Exhibit No. 5—(Continued)

initial delivery shall be postponed by the period of any delay so caused.

Upon six months written notice from the Corporation to the City, the City agrees to make available and to deliver one additional block of 6,000 kilowatts of power under the same rate, terms and general conditions, except as specifically stated to the contrary hereinafter, as for the initial contract demand.

## 4. Rate to the Corporation:

(a) Power sold under this contract for construction and emergency purposes shall be billed to, and paid for by the Corporation at the City's regular published rates for General Power.

(b) All power, except that used for construction and emergency purposes, shall be billed to, and paid for by, the Corporation at the following rates:

(b-1) Power used under the initial contract demand of 6,500 kilowatts, during the first six (6) months starting up period, may be at the rate of two and eight-tenths (2.8) mills per kilowatt hour except that a minimum monthly charge of sixty-seven (67) cents per kilowatt (fifty cents per horsepower) of indicated demand shall apply or, at the Corporation's option, at the rate of seventeen and one-half dollars (17.50) net per year per kilowatt of billing demand.

(b-2) Power used under the initial contract demand of 6,500 kilowatts, after the first six (6) months starting up period, and for the duration of

Plaintiff's Exhibit No. 5—(Continued)

this contract, shall be at the rate of seventeen and one-half dollars (\$17.50) net per year per kilowatt of billing demand.

(b-3 The additional 6,000 kilowatts, if and when used for the second furnace as referred to elsewhere in this contract shall be at the rate of seventeen and one-half dollars (\$17.50) net per year per kilowatt of billing demand, as in (2) above, except that the continuous and uninterrupted part year operations immediately following a full year's billing at the specified rate, shall be prorated.

5. Minimum Charges:

(a) The minimum monthly charges for power sold under this contract for construction and emergency purposes shall be as specified in the City's regular published rates for General Power (67¢ per kilowatt).

(b) The net minimum monthly charge for power, other than that used for construction and emergency purposes, shall be one-twelfth ( $1/12$ th) of seventeen and one-half dollars (17.50) net per year per kilowatt of billing demand, except as otherwise provided for under "Rate to the Corporation."

6. Contract Demand: The 6,500 kilowatts of power that the City is obligated to deliver under this contract shall be known as the contract demand. Delivery of power in excess of the contract demand, either with or without the consent of the City, ex-

## Plaintiff's Exhibit No. 5—(Continued)

cept as specifically provided for herein, shall not obligate the City, to make future deliveries of power in excess of the contract demand.

7. Billing Demand: The billing demand shall be the contract demand or the actual thirty (30) minute integrated demand as determined in the following paragraph, whichever is higher; provided, however, that the billing demand for any month shall not be less than the highest actual demand which occurred during the immediately preceding eleven (11) months, except as specified to the contrary under "Alteration or Cancellation of Contract Demand."

8. Power Factor: Whenever power is delivered to the Corporation at a weighted monthly average power factor of .825 or more, the actual demand for the month shall be defined as the average kilowatt delivery during the thirty (30) minute interval in which the consumption of energy is the greatest during the month. Whenever such monthly weighted average power factor is less than .825, then the actual demand shall be determined by taking .825 of the average kilowatt delivery for the thirty (30) minute interval in which the consumption of energy is greatest during the month, and dividing this amount by the weighted monthly average power factor. However, the City shall not be obligated under the terms of this schedule to deliver power to the Corporation at any time at a power factor below .80

The Corporation will make diligent efforts to improve this power factor to at least .85, if, as and



## Plaintiff's Exhibit No. 5—(Continued)

when improvements in furnace design and/or diversification of production make it feasible to do so.

9. Billing: Bills shall be rendered monthly and payments shall be due on the tenth (10th) day of each month, at the City Treasurer's office, for the previous month's power purchases. If the tenth day be on a Sunday or on a holiday, the payments may be made on the next business day. For the nominal 13,600 volt power, bills will be rendered monthly on the basis of one-twelfth ( $1/12$ th) of the annual rate. Adjustments to exactly \$17.50 per kilowatt year will be made at the end of December on the basis of the highest billing demand prevailing for that calendar year, except as specified to the contrary under "Rate to the Corporation" and "Alteration or Cancellation of Contract Demand."

Failure to receive a bill shall not release the Corporation from liability for payment. If payment is not made on or before the close of business on the due date, the City may, at any time thereafter, and after giving ten (10) days notice in writing, discontinue service until all past due bills are paid. Discontinuance of service, as herein provided, shall not relieve the Corporation of its liability for the agreed monthly payment during the period of time service is so discontinued.

10. Alteration or Cancellation of Contract Demand:

(a) For contract demands in excess of the initial block of six thousand five hundred (6,500) kilowatts.



## Plaintiff's Exhibit No. 5—(Continued)

The Corporation will be permitted on six (6) months written notice, at any time during the life of this contract, to increase its contract demand to supply one additional furnace using not to exceed six thousand (6,000) kilowatts of power. If, following the date of initial delivery of this additional block of power, conditions in the Corporation's business are depressed so that the Corporation, in its judgment, cannot use the additional power contracted for, the Corporation shall have the right, upon giving the City at least one (1) month's notice in writing, to drop this additional power, whereupon the payment shall be according to the rates previously specified herein.

In the event the Corporation elects to exercise its right of alteration, as provided for in this contract, and drops the additional power, the City is thereupon relieved of its firm power obligations for this additional block, and will again supply the power referred to upon written request from the Corporation, only if and when, in the City's judgment, surplus power is available in sufficient quantity to meet the Corporation's additional requirements. If and when the Corporation and the City later mutually agree that the City will again deliver to the Corporation its additional power requirements, such service will be on a firm power basis, to be altered downward only by the Corporation, upon at least one (1) month's written notice to the City, whereupon payments for the energy used shall be made according to the provisions of this contract.

The Corporation may permanently drop its addi-

## Plaintiff's Exhibit No. 5—(Continued)

tional 6,000 kilowatt power requirements, at any time, after one year's billing (12 consecutive months) at the specified rate. In the event the Corporation exercises this right of option, and the City is so notified in writing, the City may reclaim or salvage its equipment originally installed to serve the second furnace and its additional power requirements.

If and when the Corporation should drop its additional 6,000 kilowatt requirements, either temporarily or permanently, and shall have made at least twelve (12) consecutive monthly payments at the specified rate for this load, the "ratchet" clause specified under "Billing Demand" will be dropped proportionately.

(b) For the initial contract demand of six thousand five hundred (6,500) kilowatts.

If conditions arise which make the continuance of the Corporation's venture in Tacoma unprofitable, the Corporation shall have the right to cancel this contract provided, however, its similar ventures west of the Rocky Mountains, if any, are completely discontinued and the Corporation withdraws from that business west of the Rocky Mountains. In no event shall such cancellation take effect until at least four (4) years after the date of initial delivery. Any such cancellations shall be preceded by six (6) months' written notice to the City.

(c) For the nominal 13,600 volt power in general:

Should the City's generating and/or transmission equipment and/or facilities be temporarily damaged

## Plaintiff's Exhibit No. 5—(Continued)

so that it will be impossible to supply the domestic and essential public service, the City may request and the Corporation will reduce its load until the emergency is passed. Billing will be prorated to cover the idle time.

11. Escrow Fund: On the tenth (10) day of the first full calendar month subsequent to the date of initial delivery and on the tenth (10th) day of each month thereafter, until a total of forty-eight (48) payments shall have been made, the Corporation shall pay to the Treasurer of the City of Tacoma, sums of money equal to the number of kilowatts of the contract demand (minimum 6,500 kilowatts) for that month multiplied by twenty-nine and one-sixth (29-1/6th) cents. If the tenth day be on a Sunday or a holiday, the payment may be made on the next business day.

Such sums of money, whether in the original form of cash or after investment, plus any earnings from such investments thereof, shall be known as the Escrow Fund.

When, in the opinion of the Treasurer of the City of Tacoma, there are sufficient funds on hand, the sums of money so paid into the Escrow Fund shall be judiciously invested and reinvested by the Treasurer in securities of the United States or of the State of Washington. Provided, however, that the Treasurer may make investments in the following securities when the Corporation shall have designated that investments may be made in any of such securities, to wit: General Obligation Bonds of the

## Plaintiff's Exhibit No. 5—(Continued)

City of Tacoma, securities of the Electric Generating and Water Systems of the City of Tacoma, Port of Tacoma Bonds, Tacoma School District No. 10 Bonds, and Pierce County Bonds. Any earnings from investments shall be similarly invested and shall be added to the Escrow Fund.

Neither the city, the City of Tacoma or its Treasurer shall be liable for any loss which may occur as a result of the investment of funds as herein provided.

The moneys in said Escrow Fund shall be kept and maintained by the Treasurer at all times in a separate fund in the City Treasury and the securities physically separate and apart from the securities of the City of Tacoma. All costs of such Escrow Fund shall be borne by the Escrow Fund. The City of Tacoma shall be responsible for the conduct and actions of its officials in the handling of such Escrow Fund.

If this contract should be terminated permanently by the Corporation under any of the provisions hereof, at any time prior to the end of the seventh year after the date of initial delivery, the entire Escrow Fund shall be delivered to the City.

If this contract is not terminated permanently at any time prior to the end of the seventh year after the date of initial delivery, as aforesaid, the Escrow Fund shall be delivered to the Corporation as follows:

(a) Twenty-five per cent (25%) thereof at the end of the seventh year after the date of initial delivery.

## Plaintiff's Exhibit No. 5—(Continued)

(b) Twenty-five per cent (25%) thereof at the end of the eighth year after the date of initial delivery.

(c) Twenty-five per cent (25%) thereof at the end of the ninth year after the date of initial delivery.

(d) The remaining twenty-five per cent (25%) thereof at the end of the tenth year after the date of initial delivery.

Provided, however, if this contract is terminated by the Corporation permanently under any of the provisions hereof at any time after the end of the seventh year from the date of initial delivery and prior to the end of the tenth year after the date of initial delivery, the entire Escrow Fund as it exists on the date of such permanent termination shall be delivered to the City.

Total or partial distribution of the Escrow Fund in accordance with the provisions of this Paragraph 11 shall not be deemed to affect any of the liabilities of the Corporation to the City except its liability to pay for power after the exercise of the right of permanent termination in the manner set forth in this contract.

Distributions from said Escrow Fund shall be in kind, figured at the market value at the time of distribution.

12. Termination of Contract: Unless otherwise expressly agreed in writing any termination or cancellation of this contract shall not affect any lia-

## Plaintiff's Exhibit No. 5—(Continued)

bility for payment for power made available or for money due on or before the date of which termination becomes effective.

13. Phase, Frequency, Voltage and Metering: The electric power supplied by the City shall be three phase, alternating current at a frequency of approximately 60 cycles per second and at nominal 13,600 volts. Delivery and metering of such power shall be at a point agreed upon by the parties hereto in the vicinity of the site of the Corporation's plant as described above. In the event the point of delivery is located on the property of the Corporation, the Corporation agrees to give the City a suitable easement on such property for the construction, operation and maintenance of the City's appurtenant power and metering facilities. The Corporation, at its own expense, shall provide suitable facilities for the transformation and transmission of power between the point of delivery and the point of use.

14. Measurement of Demand, Energy and Power Factor: The City shall, without charge to the Corporation, furnish, install and maintain the necessary meters for measuring the amount of power furnished to the Corporation. Should these meters fail, the amount of power delivered will be estimated by the City from the best information available, and such estimate shall, for billing purposes, have the same force and effect as an exact meter reading.



## Plaintiff's Exhibit No. 5—(Continued)

The demand meter shall register the maximum integrated kilowatt load during any thirty (30) consecutive minutes in the year.

15. Meter Tests: The City shall, not less frequently than once each year, make periodical tests and inspection of the metering equipment installed by it. At the request of the Corporation, the City shall make additional tests or inspections of such equipment in the presence of representatives of the Corporation. The cost of such additional tests shall be paid by the Corporation if the percentage of error is found to be less than 2% slow or fast.

In the event any test or inspection made by the City shows the metering equipment to be inaccurate by more than 2% slow or fast, an adjustment, based upon the inaccuracy found, shall be made in the Corporation's bills for service rendered since the beginning of the monthly billing period immediately preceding the monthly billing period during which the test or inspection was completed, or for the actual period of incorrect billing if such period can be definitely established, but in no case for a period exceeding three (3) months.

16. Corporation's Lines and Equipment: All lines, substations and other electrical facilities (except metering equipment installed by the City), located on the Corporation's side of the delivery point, shall be furnished, installed and maintained by the Corporation unless otherwise provided by this contract.



## Plaintiff's Exhibit No. 5—(Continued)

All lines and equipment must conform to applicable state and local regulations, and to accepted modern practice, as exemplified by the requirements of the National Electrical Safety Code, and the National Electric Code.

The City shall have the right, but shall not be obligated, to inspect the Corporation's electric installation at any time, and may reject any wiring or equipment that does not conform to the standards hereinbefore specified. But such inspection, or failure to inspect, or to reject, shall not render the City, its officers, agents, or employees, liable or responsible for any loss, damage, or accident resulting from defects in such electric installation, or for violation of the contract of which these terms and conditions are a part.

17. Responsibility for Property: All meters and other facilities furnished by the City shall be and remain the City's property, and the right to remove, replace, or repair such meters and other facilities is expressly reserved. Each party shall exercise due care to protect the other's property. In the event of loss or damage to either's property, caused by the other's negligence, the cost of necessary repairs or replacements shall be paid by the negligent party.

18. Right of Access: The City shall have access to the Corporation's premises at all reasonable times for the purpose of reading meters, and for testing, repairing, renewing, exchanging or removing any

## Plaintiff's Exhibit No. 5—(Continued)

or all equipment installed by the City and for the purpose of inspecting the Corporation's lines and equipment.

19. Interruption of Service for Causes Beyond Control of the Parties: If the operation of the City's generating or transmission system or the operation of the Corporation's work is suspended, interrupted or interfered with for any cause reasonably beyond its control, including, but not by way of limitation, the failure or breakdown of generating, transmission or utilization facilities or equipment, floods, fires, strikes, accidents, acts of God, or the public enemy, war in the United States, Governmental regulations, orders or proclamations, priorities, laws, mobs, rioters, transportation difficulties, or other causes beyond the control of the parties, the City need not deliver power hereunder and the Corporation need not accept or pay for such power for such period of time and to the extent that such suspension, interruption or interference makes it reasonably impractical to deliver or use such power and monthly bills for any period including any such suspension, interruption or interference shall be prorated.

Neither party, including its respective officers, agents, or employees, shall be liable to the other for damages or for breach of contract, in the event such suspension, interruption or interference, as outlined above, by way of example but not by way of limitation, does occur.

## Plaintiff's Exhibit No. 5—(Continued)

Each party shall promptly notify the other, in advance for predetermined suspensions, interruptions or interferences, and as soon as possible, in the case of unforeseen difficulties.

20. **Additional Loads:** Additions to, or material changes in the characteristics of the load, made without permission of the City, shall render the Corporation liable for any damage caused by such additions or changes.

21. **Voltage Fluctuations:** Electric service shall not be used in such a manner as to cause objectionable voltage fluctuations or other electrical disturbances on the City's system. The City may require the Corporation, at its own expense, to install such suitable apparatus as will reasonably limit fluctuations and disturbances when such fluctuations and disturbances are determined to be objectionable by the City.

The usual operating tolerances in the service voltages will be permitted.

22. **Balancing of Loads:** The Corporation shall, at all times, take and use power in such a manner that the load at the point of delivery will not be unbalanced between phases more than ten per cent (10%), except during periods subsequent to the changing of electrodes on the Corporation's furnace or furnaces, while new electrodes are "seating themselves," and during the periods required for tapping furnaces. In the event the three-phase load is unbalanced more than 10%, with the exceptions as aforesaid for the periods following the changing of

## Plaintiff's Exhibit No. 5—(Continued)

electrodes and the tapping of furnaces, the City reserves the right to require the Corporation, at the Corporation's expense to make the necessary changes to correct such conditions, or the City may, in its determination of billing demands assume that the load on each phase is equal to the greatest load on any phase.

23. General Provisions: Sale of power under this contract shall be subject to pertinent general provisions covering all sales of electricity by the City not in conflict with this contract. A copy of these General Provisions are attached hereto and form a part of this contract.

24. Purchase of Other Power: The Corporation shall secure all its purchased power from the City, providing, however, that the Corporation shall have the right to purchase from other sources such power as the City declares itself in writing as being unable or unwilling to furnish.

In the event the City declares itself as being unable or unwilling to furnish power, as aforesaid, the City agrees to cooperate in all ways reasonable and proper with the Corporation in getting such additional power or substitute power, such cooperation to include, if necessary, the granting of franchises or rights of way to other nearby utilities or Governmental agencies engaged in the sale of power.

25. Use and Resale of Power: The Corporation shall use all of the power purchased hereunder in its own operations to manufacture electro metallurgical or other products of the electric furnace, and

## Plaintiff's Exhibit No. 5—(Continued)

such related materials as may be necessary or desirable for its processes or products. The manufacture of chlorine will not be permitted under this contract.

None of the power purchased hereunder may be resold, nor shall the Corporation sell by-product power, if and when generated.

26. Substitution of Other Rate Schedule: If during the term of this contract the City sells power to a person or Corporation engaged in similar operations of a competitive character, under a schedule containing a lower rate for the district, class and quality of service covered by this contract, the City, within sixty (60) days after receipt from the Corporation of a written request therefore, shall thereupon make such schedule available to the Corporation as long as the same is used by such competing agency, and to the extent that the Corporation is using power hereunder in the manufacture of a product in competition with such competing agency, and shall submit to the Corporation a contract for the sale of power under such schedule containing such lower rate, to be substituted for this contract. The term of such substituted contract shall be the same as the unexpired term of this contract. The Corporation's Contract Demand under such substituted contract shall not be less than the Corporation's Contract Demand under this contract immediately prior to such substitution unless the City, in its discretion, determines that such Contract Demand, at the request of the Corporation, may be reduced without prejudice to the City.

## Plaintiff's Exhibit No. 5—(Continued)

27. Assignment: This agreement shall inure to the benefit of and be binding upon the respective successors and assigns of the parties hereto; provided, however, that neither this contract nor any interest therein shall be transferred or assigned by the Corporation without the written consent of the City.

28. Waiver of Default: No waiver by either party hereto of its rights with respect to any default of the other party hereto, or with respect to any other matter arising in connection with this contract, shall at any time be considered a waiver with respect to any subsequent default or matter.

29. Remedies Under Contract Not Exclusive: Nothing contained in this contract shall be construed in any manner to abridge, limit or deprive either party hereto of any means of enforcing any remedy, either at law or in equity, for the breach of any of the provisions hereof which it would otherwise have.

Either party hereto shall have the right of complete cancellation of this contract, except for obligations previously due, if and when any of the terms and conditions contained herein are violated by the other party.

30. Bankruptcy or Insolvency of the Corporation: If any proceeding in bankruptcy involving the Corporation, or any other proceeding based on the insolvency of the Corporation, or on its inability to pay its debts as they mature, shall be initiated, or if the Corporation shall make an assignment for the



## Plaintiff's Exhibit No. 5—(Continued)

benefit of its creditors, then the City shall have the right to terminate this contract at any time after giving thirty (30) days' notice of its intention so to do; provided, that if, within thirty (30) days after the sending of such notice, the Corporation shall give proof to the City of the dismissal of such proceedings or the effective revocation of such assignment, and shall pay all charges then due under this contract, then the right of the City to terminate this contract by reason of such proceedings or assignment shall cease.

31. Notices: Any notice or demand required under this contract shall be deemed properly given to the City if mailed, postage prepaid, to the City of Tacoma, Department of Public Utilities, Tacoma, Washington, or to the Corporation if mailed, postage prepaid, to Ohio Ferro-Alloys Corporation, Tacoma, Washington. The designation of the person to be so notified, or the address of such person, may be changed at any time and from time to time, by similar notice.

32. Odors: If, in the opinion of the City, the Corporation's plant should produce or emit obnoxious and objectionable odors, noticeable beyond a reasonable distance from the plant, the City may request and the Corporation shall correct the condition herein referred to.

In Witness Whereof, the parties hereto have executed this agreement in quadruplicate, the Corporation by the signatures and attest of its duly



Plaintiff's Exhibit No. 5—(Continued)  
authorized officers, as of the day and year first  
above written.

CITY OF TACOMA, for  
DEPARTMENT OF PUBLIC  
UTILITIES, LIGHT  
DIVISION,

By HARRY P. CAIN,  
Mayor.

Approved:

R. D. O'NEIL,  
Commissioner of Public  
Utilities.

Approved:

HOWARD CAROTHERS,  
Corporation Counsel.

Attest:

GENEVIEVE MARTIN,  
City Clerk.

Countersigned:

J. M. ROBERTS,  
Asst. City Controller.

OHIO FERRO-ALLOYS  
CORPORATION,

By L. G. PRITZ,  
President.

By H. G. PAISLEY,  
Secretary.

Approved:

ROBERT R. JONES.

Approved:

J. W. WEITZENKORN.

[Endorsed]: Filed U.S.C.C.A., Sept. 5, 1947.

PLAINTIFF'S EXHIBIT No. 6

Exhibit 8. City of Tacoma, Department of Public  
Utilities, Tacoma, Washington

10-4-41.

Mr. J. W. Weitzenkorn  
Assistant to the President  
Ohio Ferro-Alloys Corporation,  
Tacoma, Washington

Dear Mr. Weitzenkorn:

We are returning herewith your copies of the long and short term contracts between the Electro Metallurgical Company and the Bonneville Power Administrator. After very careful comparison of all terms and conditions contained in these contracts with those now in effect in your contract with the City of Tacoma, we find that the Ohio Ferro-Alloys Corporation is in a very strong competitive position insofar as power is concerned.

It is our understanding that you are particularly concerned over the provision in your contract which calls for the payment of an escrow fund to the City of Tacoma to guarantee fulfillment of your contractual obligations, while, on the surface, it appears to you that the Electro Metallurgical contract with Bonneville is more liberally written in favor of your competitor. Perhaps you will recall that the escrow fund provision originally appeared in the contract tendered to you by Bonneville prior to your opening negotiations with the City. With this as a working basis, through give and take, we arrived at a mutually agreeable position, and a contract was signed with the City.

Although Bonneville still uses the escrow fund clause, when and where warranted, it was omitted in the Electro Metallurgical contract possibly because that company's Portland plant is sufficiently close to Bonneville's St. John substation to render negligible Bonneville's investment in additional power facilities installed solely for the company's use. In distinct contrast to Bonneville's negligible investment for the Electro Metallurgical Company, is the City's investment of about \$80,000.00 for the Ohio Ferro-Alloys Corporation.

That portion of your contract covering the initial demand of 6500 kilowatts, to which the escrow fund applies, permits cancellation, at your option, any time subsequent to the first four years during the life of the ten year contract. The corresponding "long term" twenty-year contract covering the Electro Metallurgical Company's initial demand permits the Company to temporarily curtail its contract demand, after the date of initial delivery, by an amount not to exceed in the aggregate 32,500 kilowatt years ( $5 \times 6500$ ) or at the most, for five years at 6500 kilowatts or demand. Thus, the Electro Metallurgical Company obligates and binds itself, regardless of business conditions, to pay for power for at least fifteen out of the twenty years, unless the Bonneville Administrator exercises his option, as provided for therein, to increase the rate for power above that prevailing at the date the contract was signed. It is interesting to note that no increase in the cost of power was contemplated or provided for in your contract with the City.

At your request the City granted an unusually low rate (2.8 mills) per kilowatt hour during the initial six months starting up period. Through this provision, not included in the Electro Metallurgical contract, you have already benefited to the extent of several thousand dollars. Again, at your request, we lowered the minimum power factory requirements from the 85 per cent required of the Electro Metallurgical Company, to 82.5 per cent. The City did not require you to build to its Tideflats Substation, but, instead, constructed a new substation for your benefit, adjacent to your property. This, in itself, is an appreciable item.

Concluding the comparison, that portion of your contract which covers the second block of power for the second furnace, to which the escrow fund does not apply, permits cancellation, at your option, any time subsequent to one year after the initial delivery of that second block of power. The corresponding "short term" contract covering the Electro Metallurgical Company's additional requirements, is strictly a two year agreement, with no way out for the Company in the event business conditions do not live up to expectations. The Company cannot exercise a right of cancellation, as you are privileged to do, and thus assumes two years of additional obligations over and above the fifteen year commitment provided for in the long term contract, all as contrasted to your privilege to unload at any time.

When all the facts in the case are fairly analyzed, we believe you will agree that your contract with the

City is so very liberally written from your point of view, that no further concessions can be expected. Most assuredly the City cannot agree to any further liberalization of its contract, or to the elimination of the escrow fund.

Respectfully yours,

/s/ R. D. O'NEIL,

Commissioner of Public  
Utilities.

rlw copy 1-8-46 (8)

rw copy 2/10/47 (6)

[Endorsed]: Filed U.S.C.C.A. Sept. 5, 1947.

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[Endorsed]: No. 11727. United States Circuit Court of Appeals for the Ninth Circuit. The Ohio Ferro-Alloys Corporation, a Corporation, Appellant, vs. City of Tacoma, a Municipal Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed September 5, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11727

THE OHIO FERRO-ALLOYS CORPORATION,  
a Corporation, vs. Appellant,  
CITY OF TACOMA, a Municipal Corporation,  
Appellee.

STATEMENT OF POINTS UPON WHICH  
APPELLANT INTENDS TO RELY ON  
APPEAL

Comes now the appellant, The Ohio Ferro-Alloys Corporation, and as its Statement of Points on which it intends to rely on appeal, required by Paragraph VI of Rule 19 of the Rules of Practice of this Court, adopts the "Statement of Points on Which Appellant Intends to Rely," filed by appellant in the United States District Court for the Western District of Washington, Southern Division, on August 8th, 1947, and appearing at pages 87 and 88 in the transcript of the record, certified by the clerk of said district court.

/s/ R. M. RYBOLT,

/s/ F. D. METZGER.

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Appellant.

Service hereof by receipt of copy acknowledged  
this 29th day of August, 1947.

/s/ CLARENCE M. BOYLE,

Attorney for Appellee.

[Endorsed]: Filed Sept. 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AS TO RECORD TO BE  
PRINTED ON APPEAL

It Is Hereby Stipulated by the parties to the above appeal as follows:

I.

The parties hereby designate for printing the entire record on appeal as certified to the Clerk of this Court by the Clerk of the District Court of the Western District of Washington, Southern Division, together with the original exhibits transmitted to the Clerk of this Court, but with the exceptions hereinafter specifically set out.

II.

All titles, captions, jurats and verifications shall be omitted from the printed record on appeal, except as may be otherwise required by the rules and practice of this Court.

III.

The following instruments or portions of instruments contained in the record on appeal as certified by the Clerk of the District Court need not be printed and shall be omitted from the printed record on appeal:

(a) Exhibit "A" attached to the plaintiff's complaint, purporting to be a copy of the written con-



tract between the parties, dated March 21, 1941, copy of which contract was received in evidence as Plaintiff's Exhibit 5 and is one of the exhibits to be printed;

(b) The Third Defense and Counterclaim contained in the Answer of the defendant City, and the whole of the plaintiff's Reply, as said defense was abandoned by the defendant City and it and the reply were ordered stricken in the Pretrial Order entered by the District Court, which order is to be included in the printed record on appeal;

(c) Plaintiff's Request for Admission of Genuineness of Documents or Alternatively Demand for Production of the Originals Thereof;

(d) The Court's Oral Decision, which is incorporated in the record on appeal as certified by the Clerk of the District Court as a separate instrument and is also incorporated in the Reporter's Transcript of the Evidence at pages 308 to 319, inclusive, of the reporter's typewritten transcript;

(e) The following exhibits which relate wholly to matters or issues not involved in this appeal: Plaintiff's Exhibits 3, 4, and 7 to 16, inclusive, and Defendant's Exhibit A-4.

#### IV.

This stipulation is intended to comply with the provisions of subdivision 6 of Rule 19 of the Rules

of Practice of this Court concerning the designation of parts of the record for printing.

Dated this 30th day of August, 1947.

/s/ R. M. RYBOLT,

/s/ F. D. METZGER,

METZGER, BLAIR, GARDNER  
& BOLDT,

Attorneys for Appellant.

/s/ CLARENCE M. BOYLE,

Corporation Counsel,

Attorney for Appellee.

[Endorsed]: Filed Sept. 5, 1947.